

Entered

JUL 1 1969

F 2302

San Francisco Law Library

436 CITY HALL

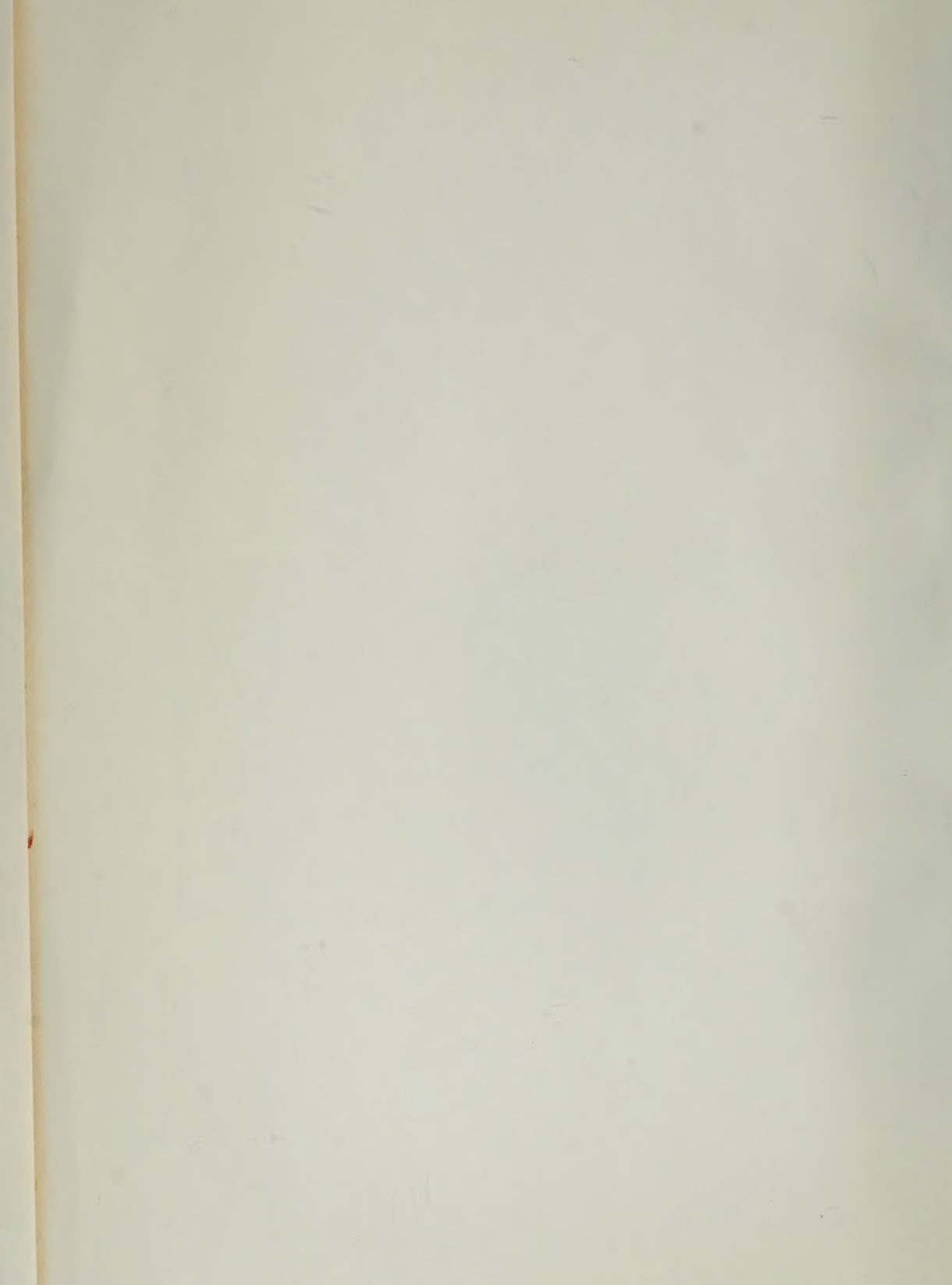
No. 192719

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





No. 21987

3455

V. 3455

**United States
Court of Appeals**
for the Ninth Circuit

NATHAN FRED MARKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLEE

SIDNEY I. LEZAK

*United States Attorney,
District of Oregon.*

JACK G. COLLINS

First Assistant United States Attorney

NORMAN SEPENUK


Assistant United States Attorney

FILED

NOV 22 1967

WM. B. LUCK, CLERK

NOV 24 1967



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

INDEX

	Page
OPINION BELOW	1
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	25
ARGUMENT:	
I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT	28
II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S ARGUMENT CONCERNING AN ALLEGED CHARITABLE CONTRIBUTION DURING THE YEAR 1961	44
III. THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT PROVED A SUB- STANTIAL TAX DEFICIENCY	50
IV. THERE WAS NO ERROR IN FAILING TO IN- FORM THE JURY OF THE APPLICABLE RATE OF TAX	60
CONCLUSION	69

INDEX OF CITATIONS CASES CITED

	Page
Beck v. United States, 298 F.2d 622, 632 (C.A. 9)	48
Bryson v. United States, 238 F.2d 657, 662 (C.A. 9)	38
Canaday v. United States, 354 F.2d 849 (C.A. 8) ..	56
Chinn v. United States, 228 F.2d 151 (C.A. 4)	37
Cohen v. United States, 297 F.2d 760, 769 (C.A. 9)	37, 41
Elwert v. United States, 231 F.2d 928, 933 (C.A. 9)	48
Fiorito v. United States, 265 F.2d 658 (C.A. 9) ..	48
Fischer v. United States, 212 F.2d 441, 443 (C.A. 10)	67
Gendelman v. United States, 191 F.2d 993, 996 (C.A. 9) cert. den. 342 U.S. 909	56, 67
Glasser v. United States, 315 U.S. 60, 80	29
Goldbaum v. United States, 204 F.2d 74, 78 (C.A. 9) cert. den. 346 U.S. 831	56
Graves v. United States, 191 F.2d 579, 582 (C.A. 10)	53, 67
Janko v. United States, 281 F.2d 156, 163 (C.A. 8)	54, 57
Leeby v. United States, 192 F.2d 331, 334 (C.A. 8)	58, 67
Montgomery v. United States, 203 F.2d 887, 892 (C.A. 5)	67

INDEX OF CITATIONS CASES CITED (Continued)

Ogden v. United States, 303 F.2d 724, 742 (C.A. 9)	38
Opper v. United States, 348 U.S. 84, 91-92	38
Pitts v. United States, 263 F.2d 808, 810 (C.A. 9) ..	48
Schuermann v. United States, 174 F.2d 397, 398 (C.A. 8)	37
Smith v. United States, 236 F.2d 260, 264 (C.A. 8) ..	67
Smith v. United States, 348 U.S. 147, 154-155	38
Spies v. United States, 317 U.S. 492, 499	28, 37
United States v. Beck, 298 F.2d 622, 630, 632 (C.A. 9)	37, 52
United States v. Chapman, 168 F.2d 997, 999-1000, 1003 (C.A. 7)	37
United States v. Cindrich, 140 F. Supp. 356 (W.D. Pa.) affirmed 241 F.2d 54, 57 (C.A. 3)	55, 57
United States v. Heider, 347 F.2d 695 (C.A. 9) ..	52
United States v. Johnson, 319 U.S. 503, 519	68
United States v. Nunan, 236 F.2d 576, 585 (C.A. 2, 1956)	24, 53, 57, 65, 66
United States v. O'Day, 186 F.Supp. 572 (D. Del)	55
United States v. Stromberg, 268 F.2d 256 (C.A. 2) cert. den. 361 U.S. 863 (1959)	38
United States v. Winston, 222 F.2d 323, 326 (C.A. 7)	38
Watts v. United States, 212 F.2d 275, 277 (C.A. 10)	24, 63, 67

**United States
Court of Appeals**
for the Ninth Circuit

NATHAN FRED MARKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLEE

OPINION BELOW

The Opinion of the District Court denying appellant's motion for a judgment of acquittal and, in the alternative, for a new trial, is contained on pages 98

through 101 of the District Court Clerk's transcript of record in the Court of Appeals.¹

COUNTER-STATEMENT OF THE CASE

On February 25, 1966, an indictment in three counts was filed against appellant in the United States District Court for the District of Oregon, charging that he had willfully attempted to evade his income taxes for the years 1961, 1962 and 1963 by filing fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. (CT 1-3). After a jury trial lasting over five days, appellant was found guilty on Count I and not guilty on Counts II and III. On November 25, 1966, the District Court (Honorable John F. Kilkenny) sentenced appellant to five years imprisonment on condition that appellant be confined in a jail-type institution for four months, the remainder of the sentence being suspended and appellant placed on probation. (CT 102).

The evidence to support the verdict of guilt may be briefly summarized as follows:

¹ References to the District Court Clerk's Transcript of Record will be designated "CT." References to the four volumes of trial testimony will be designated by volume and page number, as for example: "Vol. I, p. 1." References to government exhibits will be designated "Ex."; references to defendant's exhibits will be designated "Def. Ex."

During the prosecution years (1961-1963), appellant's principal business activity and source of income, as reported on his tax returns, was that of "registered lobbyist." (Exs. 3, 4, 5). According to appellant, he also engaged in property development and mining. (Vol. IV, p. 774). Appellant's tax returns for these years were prepared by a certified public accountant and attorney, Richard C. Kneeland. (Vol. I, pp. 34-35). Kneeland prepared the returns on the basis of monthly summaries of income and expenses furnished to him by appellant. (Vol. I, pp. 39, 71).

For the year 1961, appellant filed three tax returns which reflected his income and expenses in that year, viz: (1) the individual joint income tax return which showed a taxable loss of \$178.91 and no tax due (Ex. 3); (2) a corporate income tax return in the name of the Hetty Marks Foundation which showed a taxable loss of \$3,599.14 and no tax due (Ex. 7); and (3) a corporate income tax return in the name of the Royal Acceptance Corporation which showed a taxable loss of \$2.84 and no tax due (Ex. 17). The Hetty Marks Foundation was a corporation formed in 1960 by Kneeland on behalf of appellant. (Vol. I, p. 40). This corporation, according to Kneeland, was founded as a charitable organization but never did any charitable business or any business at all. (Vol. I, pp. 41, 45). Appellant's personal residence and automobile were

in the name of the Hetty Marks Foundation, and he maintained a bank account in that name for a short period. (Vol. I, p. 41; Vol. III, pp. 566, 570, 575, 582). Appellant, during the investigation of his tax affairs, informed Special Agent Albert Deschene that the Hetty Marks Foundation was a "dummy corporation" which was used by him as a vehicle "to help him promote his financing." (Vol. III, pp. 569, 582). Although corporate returns for the Hetty Marks Foundation were filed for the years 1962 and 1963 (Exs. 8, 9), Kneeland testified that these returns were simply in the nature of information returns and showed no income or expenses, which were more properly shown on appellant's individual returns in those years. (Vol. I, pp. 43-44). The Government accordingly treated all income and expenses shown on the 1961 Hetty Marks Foundation corporate tax return as the personal income and expenses of appellant. (Vol. I, p. 44; Vol. III, p. 646). This same procedure of attributing income and expenses to appellant personally was used with respect to the income and expenses reflected on the corporate tax return of the Royal Acceptance Corporation. This corporation was also formed by Kneeland on behalf of appellant in 1960 (Ex. 60b) for the stated purpose of engaging in real estate promotions — but as in the case of the Hetty Marks Foundation — did no corporate business. (Vol. I, pp. 45-46; Vol. III, pp. 594-595). Monies received by appellant in the prosecution year 1961 were re-

ported by him either in the corporate tax returns of the Hetty Marks Foundation or the Royal Acceptance Corporation, and the total gross income on appellant's individual return, totalling \$3,101.01, was comprised of "salaries and wages" which — according to the corporate tax returns — appellant purportedly received from the two corporations. (Exs. 3, 7, 17, 150).

During the trial, the government introduced evidence to prove that for the year 1961 appellant had failed to report as gross income a total of \$6,355.00 received from the following individuals in the amounts listed:

1. Floyd Persons	\$4,000.00
2. Ford M. Converse	850.00
3. Rudy Gross and Union Finance Co.	750.00
4. Glenn Morningstar	755.00

Appellant maintained at trial that the monies listed above did not constitute taxable income but rather were received by him as loans from the individuals named. The government, on the other hand, took the position at trial that the monies listed above constituted taxable income to appellant under either or both of two theories: (1) that these monies were received

by appellant as compensation for services rendered or to be rendered by him; or (2) that appellant received these monies under false pretenses, that he caused these funds to be applied to his own personal use and benefit under circumstances and conditions inconsistent with a loan, and that in so doing, he realized taxable income (Vol. IV, pp. 944-945).

The evidence pertaining to each of the above omissions in gross income may be summarized as follows:

1. *Floyd Persons*

Floyd Persons, who was in the mining business, first met appellant in the Spring of 1961. (Vol. I, p. 76). At that time, Persons owned some "Valentine scrip", which he was trying to exchange for government grazing land or timberland. (Vol. I, p. 79). Appellant represented to Persons that he could obtain government land patents in exchange for the scrip owned by Persons. (Vol. I, p. 77). He also represented to Persons that he had influence with people in Washington, D. C.; that he was a lobbyist there; that "he knew the Kennedys real well"; and that "he knew the Secretary of the Interior". (Vol. I, pp. 80-81). Appellant told Persons that he would need "expense money" to go back to Washington, D. C. "to see what he could do" and Persons paid over \$1,200.00 to ap-

pellant for this purpose. (Vol. I, pp. 77-79). About a week later, appellant returned \$1,000.00 of this money to Persons and told Persons that he “couldn’t do anything” with the money Persons had previously given him, and that “he had to have more money * * * to buy certain people off” in Washington, D.C. (Vol. I, p. 80).² Shortly thereafter, Persons paid over to appellant an additional \$5,000.00 in currency for this purpose. (Vol. I, p. 80). Persons had borrowed the \$5,000.00 on April 14, 1961 from Mr. and Mrs. B. H. Hamilton, and Persons — together with appellant — signed a note promising to repay this money plus six percent interest by no later than May 1, 1961. (Ex. 44). Persons and appellant agreed that if appellant was successful in obtaining the land patents, he would receive 10% of the value of the land and timber. (Vol. I, p. 82). While appellant “guaranteed” that he would obtain the land patents, it was further agreed between Persons and appellant that the money would be returned if the patents were not obtained. (Vol. I, p. 82). In connection with his ability to repay this money, appellant told Persons that “he was in a large business”; that he “was representing the Hetty Marks Foundation from back East”; that this foundation was “in the business of loaning money”; that he had a brother, Harry Marks, who was “President of the Chase-

² Appellant, when testifying at the trial, denied that he had a conversation with Persons about buying people off in Washington, D. C. (Vol. IV, p. 812).

Manhattan Bank of New York"; and he and/or "the family" were "instrumental" in loaning the owner of the Albertson Food Stores "around two million dollars". (Vol. I, pp. 83-85).

In addition to the \$5,000 paid over to appellant by Persons, the latter paid over \$200.00 more to appellant later that year. (Vol. I, p. 85).

Appellant never obtained the land patents for Persons. Persons tried repeatedly to contact appellant about these matters without success. (Vol. I, p. 87). In May 1962, after obtaining an assignment of the \$5,000 note from Mr. and Mrs. Hamilton, Persons retained an attorney, Ralph J. Shepherd, in an effort to collect the \$5,000 paid over to appellant, which was then one year overdue in payment. (Vol. I, p. 106). Shepherd wrote a letter to appellant demanding payment in full of the principal of the note plus six percent interest. (Ex. 28 BB). Appellant responded to Shepherd's letter as follows:
(Ex. 43)

"Phelps, Nelson & Shepherd,
817 Equitable Building,
Portland 4, Oregon

RE: Floyd Persons & B. H. Hamilton note
for \$5,000.00

Gentlemen:

Apparently, Mr. Floyd Persons neglected to tell you that he signed a contract and a counter note releasing me from all liability for and repayment of the note executed April 14, 1961 in the sum of \$5,000.00 payable to B. H. and Esther Hamilton and also all liability for repayment to Mr. Floyd Persons on this note in lieu of various services rendered to Mr. Floyd Persons over a period of more than a year under a series of requests for my personal services for his different ventures.

There is no basis for legal action of any kind according to my lawyer, and I sincerely hope this clears this matter up for your files."

A few weeks later, Persons filed a complaint against appellant in the Multnomah County Court, demanding payment of the \$5,000 promissory note plus interest. (Ex. 44D). Appellant filed an answer to the complaint denying liability. (Ex. 44D). After attorney Shepherd discovered that appellant was "judgment proof" (Vol. I, p. 109), no further action was taken on the complaint and it was dismissed for want of prosecution in July 1963. (Ex. 44D).

Some time after Persons had filed the lawsuit, appellant told Persons to get the "lawsuit off my back" and the \$5,000.00 would be paid back. (Vol. I, pp. 90-91). On his next meeting with Persons, however, appellant stated that he "didn't owe * * * any money" to Persons. (Vol. I, p. 91).

No part of the \$5,000.00 received from Persons was reported by appellant as gross income on his 1961 tax return.³

To support its position that the \$5,000 received by appellant from Persons constituted either income for services rendered or monies obtained by fraud and applied by appellant to his own personal use under circumstances inconsistent with a loan, the Government, in addition to the evidence above, introduced evidence that appellant — contrary to his representations to Persons — did not know Senator Robert Kennedy or Secretary of the Interior Stuart Udall (Vol. III, pp. 625-626); that appellant had never met and was not instrumental in loaning any money to J. I. Albertson, owner of Albertsons Food Stores (Vol. I, pp. 103-104); that appellant's brother, Harry

³ Appellant did report as gross income on the Hetty Marks Foundation corporate tax return the initial \$1,200.00 he received from Persons, but since \$1,000.00 of this amount was later returned by appellant to Persons, appellant was obligated to report only \$200.00 as gross income. Appellant's accountant, Richard Kneeland, failed to take account of the \$1,000.00 repayment to Persons, and accordingly overreported gross income by \$1,000.00 on this transaction. (See appellant's Brief, pp. 26-27). As related above, appellant received an additional \$200.00 from Persons in late 1961 and this amount was reported as gross income on the corporate tax return of the Royal Acceptance Corporation. (Ex. 150, p. 3). Since appellant — through Kneeland's mistake — overreported gross income by \$1,000.00, on the transaction previously mentioned, the government charged appellant with \$4,000.00 — and not \$5,000.00 — of unreported income resulting from the omission of the \$5,000.00 in currency received from Persons. (Ex. 150, p. 3).

Marks, never was "Chairman of the Board of Directors of the Chase-Manhattan Bank" (Vol. I, p. 163); that the Hetty Marks Foundation was a dummy corporation and had never loaned any money to anybody (Vol. I, pp. 44-45; Vol. III, pp. 569-582); that the alleged loan from Persons was not listed as a debt or liability in three separate applications for personal loans filed by appellant with lending institutions in September 1963, March 1964 and September 1964, respectively (Exs. 58, 119); that it was only after the commencement of a fraud investigation by Special Agent Albert Deschene in August 1964, that appellant — in what the Government contended was an effort to fabricate a loan defense — filed a loan application in September, 1965, in which the alleged loan from Persons was listed as a debt (Vol. III, pp. 542-545, 564, Ex. 140); that it was again after the commencement of the fraud investigation by Agent Deschene that appellant, for the first time, paid over to Persons as a repayment on the alleged loan \$2,000.00 in 1965 and \$500.00 in 1966 (Vol. I, pp. 91-92); that appellant told Agent Deschene during the investigation that he had performed services for Persons by contacting Mr. Karl Landstrom, Assistant to the Secretary of the Interior in Washington, D. C. — allegedly as part of his efforts to obtain Government land for Persons in exchange for scrip (Vol. IV, p. 573); that Karl Landstrom, when called as a Government witness, denied to the best of his knowledge

ever meeting appellant or having any such contact with appellant for such a purpose (Vol. III, pp. 620-623); and finally, that appellant admitted to the special agent during the investigation that the monies received from Persons were for services rendered. (Vol. III, pp. 574, 578, 584, 597).

2. *Ford Converse*

Mr. Converse, who is a retired lumberman,⁴ also owned (as in the case of Flody Persons, *supra*) some scrip which he wished to exchange for Government land. (Vol. I, pp. 111-112). Converse testified that he paid over \$2,250⁵ to appellant in 1961 (Ex. 133;

⁴ As is evident from the record, Mr. Converse, at the time of trial, was quite elderly and had difficulty in both understanding and answering the questions which were asked. (Vol. I, pp. 114-120).

⁵ In his brief (BR. 31-33), appellant states that the evidence established that Converse paid over to appellant only \$2,050.00 and not \$2,250.00, as claimed by the government. The government's evidence is contained in Exhibit 133, which is comprised of certain original checks paid over by Converse to appellant. We have again examined this exhibit in preparing this Brief, and this exhibit consists of nine original checks drawn by Converse during the year 1961, and which do total \$2,250.00, as the government contended at trial. Appellant, in his Brief (BR. 31), erroneously states that this exhibit consists of "photocopies of 8 checks" drawn in 1961. Prior to trial, the government furnished appellant's counsel with photocopies of all exhibits which the government intended to introduce into evidence. It may be that the photocopied exhibit given to defense counsel omitted one check, thereby resulting in the \$200.00 difference referred to by appellant.

Vol. I, p. 113), in return for which appellant was to use his best efforts in obtaining Government land for Converse in exchange for his scrip. (Vol. I, pp. 112-113). Appellant never obtained any land patents for Converse (Vol. I, p. 115), and Converse, after trying unsuccessfully to contact appellant, then attempted to get his money back with the assistance of his friend, Floyd Persons (Def. Ex. 224). Converse never did recover any money from appellant but stated at the trial on cross examination that — since he didn't get any scrip — he expected to get his money back (Vol. I, p. 120). Of the \$2,250 received by him, appellant reported a total of \$1,400 as income, viz: \$700.00 on the tax return of the Royal Acceptance Corporation and \$700.00 on the Hetty Marks Foundation corporate tax return (Ex. 150, p. 3).

No part of any monies received by appellant from Converse was ever listed by appellant as a liability or debt in any of the five separate loan applications filed by him with lending institutions during the years 1963, 1964, 1965 and 1966 (Exs. 58, 119, 140). Nor was any part of these monies listed as a debt or liability owed by appellant in a list of liabilities prepared by appellant's wife and furnished by appellant to the Special Agent in August 1964. (Vol. II, pp. 575-577, Ex. 28M). During the revenue investigation, appellant

admitted to the Special Agent that the additional \$850 received from Converse, which he failed to report on his return, constituted "income for services". (Vol. III, pp. 578, 597).

3. *Rudy Gross and the Union Finance Company*

During the year 1961, Mr. Gross was the President of Union Finance Company (Vol. II, p. 263). At that time, his company was in need of financial assistance. (Vol. II, p. 264). Appellant told Gross that he (appellant) could obtain financing through his brother, Harry Marks, and "connections back East". (Vol. II, pp. 264-265). Gross paid over to appellant some \$3,000.00 for this purpose.⁶ Appellant, who never obtained any financing for Gross and Union Finance Co. (Vol. II, p. 266), told Gross that he had endeavored to obtain the financing through "various syndicates and his brother Harry Marks." (Vol. II, p. 272).

Appellant's brother, Harry Marks, who was called as a Government witness, testified that he had never been approached by his brother to obtain funds for him and had had no business connections with his brother for the past fifteen years. (Vol. I, pp. 162, 164).

⁶ These monies were reported by appellant in the corporate tax returns of the Hetty Marks Foundation and the Royal Acceptance Corporation. (Ex. 150, p. 3).

In November, 1961, the Union Finance Company through Gross — in addition to the monies previously mentioned — paid over to appellant \$929.00 in the form of an interest bearing loan to be repaid by appellant at the rate of \$89.69 per month (Ex. 111). Appellant told Gross that he (appellant) wished to borrow this money “to pay some personal bills” (Vol. II, p. 271).

After receiving this money, appellant failed to make any payments on the promissory note he signed in connection with the alleged loan (Ex. 111). Efforts made by Union Finance Co. to obtain payments on the note were unsuccessful and the note was eventually assigned to Investment Service Co. after Union Finance Co. went into bankruptcy (Ex. 111). In November, 1962, Investment Service Co. made formal demand of appellant for payment of the monies due on the note (Ex. 111). On December 4, 1962, appellant replied by letter as follows (Ex. 111, p. 2):

“Gentlemen:

“This is in reply to your letter of November 26, 1962. Your demand was a little shocking. I had heard that Union Finance Co. was in receivership.

“I enclose herewith my statement for services rendered for and at the request of Union Finance Co. My records are very detailed. I

have various files and papers to show and to prove work done on this account. During this time I also contacted The United States National Bank, so my work will not be a new item.

"The note was signed at the request of the Union Finance Co., in fact the funds were used on the Nov. 23rd through Dec. 2 trip to Washington, D. C. It was to be cancelled out after my return. I therefore take the position that my trip expenses have not been paid.

"I hereby make demand for payment of the sum of \$6,500.00 plus the further sum of \$1,136.48 due on the note. If full payment is not received within 10 days, I will refer the matter for collection."

Thereafter, on December 15, 1962, appellant again wrote to Investment Service Co. renewing his demand for payment "for services rendered", and threatened a lawsuit if payment was not forthcoming. (Ex. 111). Such a lawsuit was filed by appellant on January 7, 1963, requesting judgment against the co-defendants Union Finance Co. and its assignee United States National Bank in the sum of \$6,500.00 for "fees and expenses" allegedly earned by appellant, as stated in the complaint, "as consultant for the purpose of obtaining funds to refinance the defendant Union Finance Co." (Ex. 111).

No part of the \$929.00 received by appellant was reported by him as gross income on his tax return.⁷

At the trial, appellant claimed that the \$929.00 received from Union Finance Company was a loan and therefore properly excludible from gross income. (Def. Ex. 258). The Government's evidence established that this alleged loan was not listed by appellant as a liability or debt in any of five separate loan applications filed by him with lending institutions during the years 1963, 1964, 1965 and 1966 (Exs. 58, 119, 140). Nor was any part of these monies listed as a debt or liability owed by appellant in a list of liabilities prepared by appellant's wife and furnished by appellant to the Special Agent in August, 1964 (Vol. II, pp. 575-577, Ex. 28M). During the revenue investigation, appellant admitted to the Special Agent that all the monies received from Rudy Gross and the Union Finance Co. were "for services". (Vol. III, p. 584).

4. *Glen Morningstar*

Mr. Morningstar, a cabinetmaker, testified that he

⁷ Of the total amount of \$3,969.74 received by appellant from Gross and Union Finance Co., appellant reported \$3,219.74, thereby leaving unreported income of \$750.00, and not \$929.00, the amount of the alleged loan. The discrepancy is due to a bookkeeping error made by appellant's accountant, Richard Kneeland, which resulted in overposting by \$179.00 income received from Gross and Union Finance Co. Accordingly, the amount of \$929.00 which appellant failed to report was reduced by \$179.00, leaving an understatement of \$750.00 (Ex. 150, p. 3)

paid over to appellant a total of \$1,050.00 in the year 1961 comprised of \$750.00 in checks and \$300.00 in currency (Vol. II, pp. 250-251; Ext. 122). Appellant told Morningstar that, in return for these monies, he (appellant) would promote "a timber and mining deal" for their benefit at Gold Beach, Oregon, and that he would "set up a little cafe in" Gresham, Oregon, for Morningstar's wife (Vol. II, pp. 252-253). For these and other alleged purposes, three corporations were formed by appellant for Morningstar; none of which—according to Morningstar—ever did any business (Vol. II, pp. 248-250, 251-253, 254). Morningstar stated that the cafe which appellant was to set up for Morningstar's wife "never went through" and "nothing ever came" out of any of these transactions (Vol. II, pp. 253, 256). Morningstar further testified that, from his contact with appellant, it was his understanding that the Hetty Marks Foundation was supposed to have "a lot of money" and that appellant was "a friend" of Jimmy Hoffa (Vol. II, pp. 253-254, 255). The government's evidence established that the Hetty Marks Foundation was simply a "dummy corporation" with no substantial assets (Vol. I, pp. 44-45; Vol. III, pp. 569, 582), and that Jimmy Hoffa had never met, and did not know the appellant (Vol. III, p. 626).

On cross-examination, Morningstar, in reply to questions concerning the \$300.00 in currency he paid over

to appellant, stated the purpose of "most of these payments" was to buy gas to go to Seattle with appellant who "had some business dealings in Seattle." (Vol. II, p. 261) Morningstar further testified that his function on such trips was to drive the car for appellant, and Morningstar specifically stated that he did not consider such payments to be "loans" to appellant. (Vol. II, p. 261). Of the \$1,050.00 paid over by Morningstar to appellant in 1961, appellant reported \$250.00 as income in the tax return of the Royal Acceptance Corporation, leaving unreported income of \$755.00 (Ex. 150, pg. 3).

On the last day of testimony at the trial (Vol. IV, p. 896), and several days after Morningstar had testified (Vol. II, p. 247), Mrs. Marks, in support of appellant's loan defense, stated that during the years 1959 and 1960, appellant—who at that time owned and operated the M & M Salvage Co.—had advanced "various amounts" to Morningstar for the purpose of setting up a "junk yard"; that, in return for these alleged advances, Mr. and Mrs. Morningstar allegedly signed a document on November 16, 1960, recognizing the liability (Vol. IV, pp. 898-899; Def. Ex. 274); and that the \$1,050.00 which Morningstar paid over to appellant in 1961 "was a repayment of" the money allegedly advanced to Morningstar in earlier years (Vol. IV, pp. 896-899).

When Morningstar had testified as a government witness earlier in the trial, no questions were asked of him on cross-examination concerning this alleged loan (Vol. II, pp. 257-261). Morningstar had testified on direct examination as a government witness that, aside from \$100.00 which he received from appellant in 1960, the only other monies he had received from appellant consisted of "about \$25 at a time *** on a couple of occasions." (Vol. II, p. 256). Neither Mr. nor Mrs. Morningstar was called by appellant as a witness to corroborate the testimony of appellant's wife concerning the alleged loan.

To further rebut the loan defense, the government's evidence established that appellant reported as income \$250.00 of the \$1,050.00 received from Morningstar (Ex. 150, p. 3); that no part of any monies received by appellant from Morningstar was ever listed by him as a liability or debt in any of the five separate loan applications filed by him with lending institutions during the years 1963, 1964, 1965 and 1966 (Exs. 58, 119, 140); that no part of these monies was listed as a debt or liability owed by appellant in a list of liabilities prepared by appellant's wife and furnished by appellant to the Special Agent in August, 1964 (Vol. II, pp. 575-577, Ex. 28M).

As previously stated, appellant reported a negative taxable income of \$178.91 and no tax due on his 1961 tax return (Ex. 3).

Based upon the above omissions from gross income amounting to \$6,355.00, and after allowing all deductions claimed by appellant (Vol. IV, pp. 876-879, 888-893; Ex. 154), it was the government's contention that appellant had a corrected taxable income of \$2,099.81 and a corrected tax liability of \$419.96 (Exs. 150,-55).⁸

Aside from the above omissions from income, further evidence of appellant's wilful intent to evade taxes is set forth in Argument I, *infra*, concerning the sufficiency of the evidence to support the verdict, to which the Court is respectfully referred.

⁸ Appellant, in his brief (BR. 16, Appendix A) correctly points out that the government's expert witness made a technical error in his computation of taxable income and tax for the year 1961. This error arose after the government's technical expert, Mr. Klass, made a revised computation of taxable income after Judge Kilkenny had ruled that certain monies received by appellant in the year 1961 from one Alton Glenn did not constitute taxable income to appellant and should be eliminated from the case. (Vol. IV, pp. 909-916, 923). Mr. Klass mistakenly deducted the amount received by appellant from Glenn (\$7,412.50) from taxable income instead of from the adjusted gross income. (See Exhibit 55). By virtue of the limitation on medical expense deductions, which are limited to those in excess of 3% of adjusted gross income, Mr. Klass's error resulted in overstating appellant's taxable income by \$222.38 and his tax by \$44.47. Accordingly, appellant's corrected taxable income is \$1,877.43 (and not \$2,099.81), and appellant's corrected tax liability is \$375.49 (and not \$419.96). This error was overlooked by both sides during the trial and was not called to the attention of either the jury or the District Court. However, we have used the lower and correct figures for taxable income and tax throughout the remainder of this brief.

Following the jury's verdict of guilt for the years 1961, appellant filed a Motion for judgment of acquittal and, in the alternative, for a new trial, which was denied by the District Court *inter alia* as follows (CT 98-101):

"This matter is before the Court on defendant's motion for a judgment of acquittal and, in the alternate, for a new trial.

"At the outset, I express the view that the defendant, on the record in this case, could well be likened to a miniature Ponzi. That in his relations with his victims, as shown by the testimony, he was a common cheat and a complete fraud, there is no doubt. How successful he was in his fraudulent schemes is clearly demonstrated by the fact that he ensnared not only the innocent, but also the "sharpies," including attorneys on the road to disbarment for somewhat similar schemes. His acquittal on Counts Two and Three, in my opinion, can only be explained by the "blast" of the United States Court of Appeals for the Ninth Circuit against the Government's principal witness.⁹ This "blast" appeared in newspapers of wide circulation and on TV and radio on the fourth day of the trial.

"Although I carefully cautioned the members of the jury against reading anything in the newspapers or listening to anything on TV or the radio about this case, I did not anticipate that the chief Government witness in this case would be roundly criticized in connection with his testimony in another tax case. That some,

if not all, of the members of the jury read or listened to this criticism is beyond question.⁹
 (Footnote ours)

“Be that as it may, defendant was convicted on only one count to evade and defeat a substantial part of his income tax. Neither the jury, nor the Court, is concerned with the defendant’s fraudulent conduct, except insofar as it relates to the count on which the defendant was convicted.

“One of the defendant’s principal complaints is that Court did not inform the jury on the tax rate to be applied in computing the tax deficiency. It is evident that neither the Government, nor defendant’s counsel, were of the belief that these schedules and rates should be submitted to the jury. No requested instructions on that point were submitted, nor was the question in any way raised by the defendant. Obviously, at the time of the trial, all participants, including the Court, felt that the tax deficiency, if any, was a subject for expert testimony. Manifestly, the theory that the rate schedules should have been submitted to the jury is an afterthought on the part of counsel for defendant. The trial of the case consumed in excess of five days. I do not believe that the defendant should be now permitted to raise this question.

⁹ For the sake of clarity, we wish to respectfully point out that the “blast” referred to by Judge Kilkenny, was contained in the initial Opinion of this Court in *United States v. Lenske*, decided October 5, 1966. No. 19,539 and No. 20,448 (not officially reported) Although this opinion did not mention the Special Agent by name, the news media — as Judge Kilkenny states — picked up the Agent’s name from the

"In any event, it is my view that it was not necessary for the Government to introduce evidence as to the exact amount of the additional tax due. The case is made when the Government presents substantial evidence from which the jury could find that a substantial amount of *net income* was not reported and that the failure to so report was willful and intentional. The amount of the additional income tax is not the important feature as long as it was a substantial sum. *Watts v. United States*, 212 F.2d 275 (10th Cir. 1954). Of similar import is *United States v. Nunan*, 236 F.2d 576 (2d Cir. 1956).

"On the record before me, there is substantial evidence on which the jury could find that the defendant had willfully failed to report over \$2,000.00 in taxable income on this particular count. Of course, the tax on such unreported income would be substantial.

* * *

"I have carefully considered the voluminous briefs filed by counsel for defendant and have analyzed the cited cases. I am convinced that the case was properly submitted to the jury and that defendant had a fair trial.

* * *

"Therefore, the defendant's motion for a judgment of acquittal and, in the alternate, for a new trial, must be denied."

record in the *Lenske* case and mentioned the Agent by name in its account of the *Lenske* opinion. This initial opinion in the *Lenske* case was later withdrawn in the Court's subsequent opinion of August 28, 1967, not yet officially reported. Both opinions are unofficially reported, respectively, in 66-2 CCH No. 9686 and 67-2 CCH No. 9631.

SUMMARY OF ARGUMENT

I.

The evidence, viewed in the light most favorable to the government, was sufficient to support the verdict. The crucial issue in the case in determining the existence of a tax deficiency was whether certain monies paid over to appellant during 1961, and not reported by him on his tax return, constituted taxable income or loans. The jury, by its verdict, obviously resolved this issue of fact against appellant after the respective positions of the parties had been clearly defined by statements of counsel, the testimony, and the trial Court's instructions. There was ample evidence to support the conclusion of the jury that a substantial part of the unreported income was received by appellant simply in the form of a "loan" but without any bona fide recognition on his part of a loan obligation.

II.

An additional factual issue in the case concerned the value of an alleged charitable contribution made by appellant in 1961 to the Rainbow Division of the Oregon City Police Department. This donation consisted of merchandise and fixtures of a second hand store operated by appellant under the name M & M Salvage Co. No such charitable contribution was claimed by appellant on his 1961 tax return, and

appellant accordingly had the burden of proving deductibility. Contrary to appellant's claim that the merchandise had a value of \$2500.00, the government's evidence established (and the jury was warranted in finding) that it was of little if any value. Moreover, the trial Court was correct in holding that the affidavits submitted by appellant in support of his motion for new trial did not properly constitute newly discovered evidence and in any event were simply cumulative to evidence introduced at trial on the alleged charitable nature of the gift.

III.

The trial Court properly held that the government had proved a "substantial" tax deficiency. The jury was carefully and correctly instructed on the meaning of the term "substantial," and proof by the government of additional unreported taxable income of over \$2000.00, when appellant had reported a taxable loss, clearly creates a "substantial" deficiency under the rationale of the decided cases.

IV.

There was no error in failing to inform the jury of the applicable rate of tax. This point was not raised by appellant in the District Court and there are no circumstances to warrant invocation of the "plain error"

rule. In any event, no error exists. The jury had before it, through the government's expert witness, the precise amount of unreported income and tax claimed by the government, and this was sufficient to establish a *prima facie* case. Since appellant claimed at trial that he had a lower unreported income than that shown by the government, the matter of the rate to be applied to this unreported income became a matter of defense. Moreover, where (as here) the government proves substantial unreported taxable income, it follows as a matter of law that there is a "substantial" tax deficiency.

ARGUMENT**I****THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT.**

At the trial, the government had the burden of establishing: (1) a substantial tax deficiency and (2) a willful attempt by appellant to evade and defeat the tax. *Spies v. United States*, 317 U.S. 492. The District Court held that the jury had ample evidence before it to support their finding that appellant had willfully failed to report a substantial portion of his taxable income and tax (CT. 100).

Appellant, in his brief, argues that there was a failure of proof with respect to both the existence of a substantial tax deficiency and the element of wilfulness. In making these contentions, it is clear that appellant does no more than complain that the jury did not accept his version of the case. To support his defense that there was in fact little if any tax deficiency, appellant offered evidence that the monies received constituted loans and were properly not reportable by him on his tax returns. The government, to show the contrary, introduced evidence in support of its alternative theories that appellant received these monies either as compensation for personal services or by

means of fraudulent representations, and that he dealt with these monies under circumstances inconsistent with a loan. Each side, in its opening statements and closing arguments (Volume I, pp. 11-33), and the Trial Court in its instructions (Volume IV, pp. 942-947), made clear to the jury the respective contentions of the parties as to each element of the offense. The jury, by its verdict, rejected appellant's defense and, when viewed in the light most favorable to the government (*Glasser v. United States*, 315 U.S. 60, 80), the evidence was entirely ample to support the jury's verdict.

As shown above in the Counterstatement of the Case, appellant's willful omissions from gross income were established *inter alia* as follows: (1) The appellant failed to report in his 1961 tax return \$850.00 of the \$2,250.00 received by him from Ford Converse. (Ex. 150, p. 3) Converse testified that he paid over this money to appellant in order to obtain patents to land in exchange for scrip, and appellant had agreed to obtain these patents in return for the monies received. (Vol. I, pp. 111-113) Contrary to appellant's claim at the trial that all the monies received from Mr. Converse constituted loans, his own accountant, Mr. Kneeland, reported \$1,400.00 of this money as income for the year 1961—\$700.00 being reported as income on the tax return of Royal Acceptance Corporation and \$700.00 listed as income on the tax return of the

Hetty Marks Foundations. (Exs. 23B, 150) Since Kneeland testified that he had instructed Mr. Marks to inform him of all receipts (loans or otherwise) and further testified that he based his income figures on information received from and discussed with Mr. Marks (Vol. I, pp. 38-39), it is clear that appellant omitted from income a substantial part of these monies received from Converse. (2) Appellant failed to report \$750.00 received from Rudy Gross, President of the Union Finance Company (Ex. 150, p. 3) The Court will recall that this item formed part of an alleged loan of \$929.00 received by appellant on November 21, 1961 (Vol. II, p. 271; Ex. 111) Appellant had obtained other monies from Mr. Gross and the Union Finance Company after making false representations that he could obtain financing from his eastern connections, including his brother, Harry Marks. (Vol. I, pp. 162, 164; Vol. II, p. 272) Appellant failed to make any payments on the promissory note he signed in connection with the alleged loan. (Ex. 111) When efforts were made to collect these monies in 1962, appellant characteristically repudiated the loan arrangement. In a letter of December 4, 1962, he claimed that the monies were received "for services rendered," and shortly thereafter instituted a law suit (later dismissed for want of prosecution) against Union Finance Company demanding an additional sum of \$6,500.00 "for fees and expenses" allegedly incurred on behalf of Union Finance Company. (Ex.

111) (3) Appellant reported in his 1961 tax return only \$250.00 of a total of \$1,005.00 received from Glenn Morningstar (Ex. 150, p. 3) Appellant told Morningstar that, in return for these monies, Morningstar would have a part in the development of mining claims on certain property in Gold Beach, Oregon, and that Morningstar's wife would manage a cafe in Gresham which the appellant was allegedly going to establish. (Vol. II, pp. 252-253) For these alleged purposes, several corporations were formed by appellant, none of which—according to Morningstar—ever did any business or served any other function. (Vol. II, pp. 253, 256) Mr. Marks had falsely represented to Morningstar that he was a personal friend of Jimmy Hoifa. (Vol. II, p. 255; Vol. III, p. 626) He also led Morningstar to believe that, contrary to the truth, the Hetty Marks Foundation had substantial assets. (Vol. I, pp. 44-45; Vol. II, pp. 253-254; Vol. III, pp. 569, 582) The amounts received from Morningstar (except for certain insignificant amounts which we will further discuss below) did not even purport to be loans. No promissory note or other security was given by appellant to Morningstar, and appellant in fact reported to his accountant, Mr. Kneeland, a part of the amount received from Morningstar as income, not as a loan. (Ex. 150, p. 3) As in the case of Ford Converse, this was a pure and simple failure to report a substantial portion of gross receipts as income. (4) Appellant failed to report \$4,000.00 in currency received from

Floyd Persons in the year 1961. (Ex. 150, p. 3) Persons testified that, during 1961, he paid over to appellant a total of \$6,400.00, which was comprised of two checks for \$1,200.00 and \$200.00, respectively, and \$5,000.00 in currency. (Vol. I, pp. 77-80, 85) One thousand dollars of this amount was returned by Mr. Marks to Persons, leaving a balance of \$5,400.00, of which Mr. Marks failed to report \$4,000.00. (Ex. 150, p. 3) The Court will recall that Persons borrowed the \$5,000.00 which he gave to Mr. Marks from Mr. and Mrs. Hamilton. Persons and Marks both signed a promissory note to the Hamiltons for this amount, and Marks agreed to pay back the money to Persons. (Ex. 44) The appellant had procured the money from Persons on the basis of his representations that he would use this money for travel expenses and to "buy off" his alleged connections in Washington, D.C. in order to obtain land patents in exchange for scrip. (Vol. I, p. 80) He falsely represented to Persons that he was a friend of the Kennedys, Secretary of the Interior Udall, J. I. Albertson, of Albertson's Food Stores, that his brother Harry Marks was the President of the Chase Manhattan Bank, and that the Hetty Marks Foundation was a wealthy organization. (Vol. I, pp. 83-85, 103-104; Vol. III, pp. 625-626) Similar to the case of Rudy Gross, above, when Mr. Persons attempted to get back his money which he had been induced to part with in the form of a loan, appellant—in a letter to Persons' attorney—repudiated the loan

and claimed that the money was received in payment for "various services rendered" to Mr. Persons. (Ex. 43). Appellant maintained this position in defense to a lawsuit filed against him by Persons (Ex. 44D) which was eventually dismissed for want of prosecution since appellant was judgment proof. However, after the commencement of the revenue investigation of appellant in 1964, he then started to make payments to Persons the following year purportedly in repayment of the alleged loans. (Vol. I, pp. 91-92) The Persons transaction, as well as that of Rudy Gross, is a clear illustration of appellant's pattern of conduct, viz: induce the victim to part with the money by misrepresenting the true facts; place the transaction in the form of a loan to further lull the victim and to conceal taxable income from the Government; deny that the monies were loaned when efforts were made to collect; place assets in the names of a dummy corporation (such as the Hetty Marks Foundation) to become judgment proof, thereby frustrating potential creditors; and, upon discovery by the Internal Revenue Service that the monies obtained were not reported as income, again place the transaction in the guise of a "loan" by making what purported to be repayments of the "loan" in an effort to dissuade prosecution.

To further demonstrate that the monies received by appellant did not constitute loans, the government es-

tablished (See statement, *supra*) that appellant never recognized the existence of any loan obligations to either Converse, Persons, Morningstar or Gross in Financial Statements filed by him with various lending institutions (Exs. 58, 119, 140); and that he claimed such an obligation to Persons in a September 1965 loan application only after a Revenue Service investigation had commenced in an effort to forestall prosecution. (Vol. III, pp. 542-545, 564, Ex. 140) In addition to the foregoing evidence, the government introduced other proof of appellant's willful conduct and attempts to conceal taxable income from the government, by showing that he dealt extensively in currency (See eg. Vol. I, pp. 80, 212; Vol. II, pp. 267, 362, 347-348, 395-396; Vol. III, p. 548); that he maintained only one little-used bank account in the name of the Hetty Marks Foundation (Vol. I, pp. 41; Def. Ex. 249); that he made a statement to Mrs. Donna Schmaltz, an employee of a safe deposit box rental establishment, that he was having some difficulties with the the Interstate Commerce Commission and wanted to rent a box in an assumed name to conceal (as he sought to conceal income) papers from the Interstate Commerce Commission (Vol. III, pp. 535-536); that, as early as 1958, appellant was engaged in the same pattern of fraudulently inducing his victims to part with their money in the form of a loan when he obtained \$3,000 in currency in that year from Mrs. Minnie Woolworth, which he

promised to pay back and never did. (Volume III, pp 547-554; see also Volume III, pp. 525-528); that this pattern of creating alleged loan obligations which were never honored or intended to be continued into the year 1964 when appellant acquired \$4,000 in currency from Mr. Walter W. Fellman to whom appellant had represented that he was acting as the agent of the Hetty Marks Foundation for the acquisition of property in the area of Washougal, Washington (Vol. II, p. 359); that appellant falsely represented to Fellman that the Hetty Marks Foundation (which, in truth, was a "dummy corporation" with virtually no assets) was valued at "somewhere around four hundred million dollars" (Vol. II, p. 361); that appellant falsely represented to Fellman that he needed this \$4,000 to finance a trip back to New York to meet "the Board of the Hetty Marks Foundation" allegedly for the purpose of obtaining Board approval for certain property acquisitions in the Washougal area (Vol. II, pp. 363, 367); and that appellant, who represented to Fellman that the money would be paid back "immediately" after the New York trip, never paid Fellman any money. (Vol. II, pp. 364, 367)

Moreover, appellant's attempt to conceal the receipt of taxable income in the form of a loan was strikingly demonstrated by the testimony of Robert Pearlman, a Washington attorney who — together with his family — visited with appellant in late 1961,

and testified as follows on direct examination as a government witness (Vol. III, p. 635):

"Q Now, on that particular occasion at his home in October, 1961, did you have a discussion with him concerning Federal income taxes?

"A Yes, we — that was one of the items that we —

"Q Will you give us the substance at that time of what was said by Mr. Marks?

"A At that time he explained his method of operation as being he would get money from individuals and give a note back, with the understanding that the note was not to be collected on.

"Q Did he say any thing else at that time? Did he say what he got the money for?

"A Well, he was in public relations and as a lobbyist, and I would say an influence peddler.

"Q Is that what he got the money for, according to Mr. Marks?

"A Yes.

"Q And did he say why he arranged his affairs in that manner?

"A Well, he said this is one way that he didn't have to pay any tax on it."

In short, the record reveals a clear case of a pattern of fraudulent conduct, "the likely effect of which would be to mislead or to conceal", condemned by the Supreme Court in *Spies v. United States*, 317 U.S. 492, 499. Appellant sought to conceal from the Internal Revenue Service the existence of taxable income and the extent of his financial operations. This was clearly indicated by the fact that he failed to report to his accountant all taxable receipts; his extensive use of currency, and the covering up of assets and income by the use of dummy corporations, *United States v. Chapman*, 168 F.2d 997, 999-1000, 1003 (C.A. 7th); *Schuermann v. United States*, 174 F.2d 397, 398 (C.A. 8th); *Spies v. United States*, *supra*, 499; *Chinn v. United States*, 228 F.2d 151 (C.A. 4th); and the disguising of taxable income in the form of loans. *Cohen v. United States*, 297 F.2d 760, 769 (C.A. 9th); *United States v. Beck*, 298 F.2d 622, 630 (C.A. 9th).

All of the above evidence which we have related is without regard to appellant's admissions to the Special Agent during the investigation that the monies received from Persons, Converse, Gross and Union Finance Company were for "services" rendered. (Vol. III, pp. 574, 578, 584, 597). It is clear, therefore, contrary to appellant's assertion in his brief (BR. 61-63), that these admissions to the Special Agent were

fully corroborated within the meaning of *Opper v. United States*, 348 U.S. 84, 91-92, and *Smith v. United States*, 348 U.S. 147, 154-155.¹⁰

In his brief, appellant conveniently ignores much of the above evidence and persists on appeal, as he did before the jury, in viewing the evidence only in the light most favorable to himself. Thus, appellant continues to portray himself as somewhat of an ignoramus with a sixth grade education who is "not good at figures." (BR. 2, 56) As shown by the above statement of the case, and our discussion herein, this portrayal is contrary to the evidence which revealed

¹⁰ Appellant, in his brief (BR. 62) also refers to the Government's alleged failure to corroborate statements made by him to various private individuals who were government witnesses in the case. While we believe that the evidence narrated above totally refutes appellant's argument, we note that two of these statements by appellant to the witnesses Caldwell (Vol. II, p. 284) and Pearlman (Vol. III, p. 635) were made *prior* to the offense which was committed with the filing of the fraudulent 1961 income tax return on July 27, 1962 (Ex. 3), and hence need not be corroborated. *Ogden v. United States*, 303 F.2d, 724, 742. (CA 9) The statement by appellant to the witness Slavans (Vol. II, p. 418) referred to in appellant's brief (BR. 62), was made in 1964 and after the commission of the offense. Although the Court need not reach this issue since the evidence sufficiently corroborated this statement, we note that it is apparently an open question in this Circuit whether such post-offense admissions to someone other than an investigating agent fall within the corroboration rule. *Bryson v. United States*, 238 F.2d 657, 662 (C.A. 9). Other Circuits have held that the corroboration rule is applicable only to post-offense admissions made to law enforcement officials. *U.S. v. Winston*, 222 F. 2d 323, 326 (C.A. 7); *United States v. Stromberg*, 268 F.2d 256 (C.A. 2), *cert denied*, 361 U.S. 863 (1959).

appellant to be a highly shrewd manipulator of persons. As Judge Kilkenney noted, the record disclosed appellant to be "a common cheat and a complete fraud" who was so clever in perpetrating his fraudulent schemes "that he ensnared not only the innocent, but also the 'sharpies'." (CT. 98)¹¹

Indeed, appellant's claim that he is "not good at figures" and that income taxes are beyond his ken is specifically belied by his statements to various government witnesses that "he never paid taxes" (Vol. II,

¹¹ In view of the jury verdict of acquittal on Counts II and III of the Indictment, alleging willful attempted tax evasion for the years 1962 and 1963, we have carefully refrained from referring to any evidence concerning the circumstances under which appellant received money from government witnesses during those years. However, for purposes of appellate review, we believe that such testimony clearly remains relevant on the issue of whether appellant possessed the shrewdness and intelligence, as the government contended, to arrange his affairs in the form of "loans" for the dual purpose of inducing his victims to part with their money and to conceal income from the U. S. Government. As we have related above, appellant, at the trial, in our view feigned a naivete about business matters in testifying as follows: that he got to the middle of the sixth grade in school (Vol. IV, p. 784); that he had no training in arithmetic or figures (Vol. IV, p. 784); that he was "not at all" good at figures (Vol. IV, pp. 784-785); that he "sometimes get confused on figures" (Vol. IV, p. 786); that he didn't "understand figures" (Vol. IV, p. 788); and that he "truthfully couldn't" understand the material contained in the books mentioned in the next footnote (Vol. IV, p. 796). Again, without attempting to refer in detail to the remaining evidence in the case concerning monies paid over to appellant by other government witnesses in the years 1962 and 1963, suffice it to say that the entire record fully supports Judge Kilkenney's conclusion, and that of the jury, that appellant was at least bright enough to form the wilful intent to evade taxes.

p. 283); that preparing income tax returns was "one thing he knew how to do well" (Vol. I, pp. 214-215); that, after handing the witness Slavens certain "money-making" books,¹² appellant told Mrs. Slavens how "I could save this money after I made it rather than pay it all for taxes" (Vol. II, p. 418); and that he arranged his affairs so "that he didn't have to pay any tax." (Vol. III, p. 635).

Appellant also blandly asserts (BR. 20, 33) that he probably was "in error" and simply "made a mistake" in reporting as income a portion of the monies received from Morningstar and Converse. The jury, quite to the contrary, could, and no doubt did, conclude that appellant wilfully omitted from gross income the remaining monies received from Morningstar and Converse.

Appellant refers (BR. 18, 22, 29, 32) to various statements of government witnesses Morningstar, Gross, Persons, and Converse to the effect that they thought they were loaning money to appellant. While the Court is respectfully referred to the government's counter-statement of the case for a full review of the

¹² These books (Exs. 148A-148G) were variously entitled: "How To Legally Avoid Paying Taxes"; "How To Start Getting Rich"; "How To Make A Killing In Real Estate"; "How To Scheme Your Way to Profit"; "Secrets of Banking & Borrowing"; "Pocket Guide to Daily Money-Handling (How To Keep From Being Cheated)"; and "Secrets of Speculation", all by Sidney Walton, and published by "Profit Research, Inc."

evidence on this issue of income versus loan, it is clear that resolution of this fact question depended as much, if not more, on *appellant's* intent to be bound by a loan obligation and to repay the money. *Cohen v. United States*, 297 F.2d 760, 767, 769 (C.A. 9). The trial Court correctly so instructed the jury (Vol. IV, pp. 945-946), and, as we have previously shown, the jury had ample evidence before it to resolve this question against appellant.

In further support of his loan argument, appellant refers (BR. 29) to the fact that he paid back some \$2500.00 to Persons on the alleged loan of \$5,000.00. The Court will recall that appellant had earlier rebuffed Persons' efforts to collect the alleged loan by claiming that the monies had been received for "services rendered", and appellant thereafter stated to Persons that he "didn't owe any money" to him. (Ex. 43; Vol. I, p. 91). It was only well after the commencement of the revenue investigation in August, 1964 (Vol. III, pp. 563-564), that appellant, for the first time paid over any monies to Persons beginning in June, 1965, with a payment of \$500 (Vol. I, pp. 91-92; Def. Ex. 231). Indeed, shortly after he was contacted by the special agent, appellant acknowledged to the agent that the monies received from Persons were for services rendered. (Vol. III, pp. 574, 578, 584, 597). However, as the investigation progressed and no doubt as the theory of the government's

case became more evident, appellant shifted his position and asserted that the monies were received as loans (Vol. III, pp. 602-606). It was at about this time that appellant commenced his payments to Persons (Def. Ex. 231). No such payments, however, were made to government witnesses Minnie Woolworth or Walter Fellman, from each of whom appellant had obtained "loans" of \$3,000.00 in 1958, and \$4,000.00 in 1964, respectively, with the avowed promise of paying the money back (Vol. II, pp. 361-362, 364, 367; Vol. III, pp. 548, 552-554). Significantly, the years 1958 and 1964 were not included in the prosecution period and the jury could properly have concluded that the repayment to Persons was motivated by appellant's desire to either avoid or successfully defeat prosecution by again placing the transaction in the form of a loan.¹⁸

Finally, we note that the issue of appellant's credibility was sharply presented to the jury when appel-

¹⁸ The trial Court charged the jury on this point as follows: (Vol. IV, pp. 946-947)

"It is the intent at the time that the money was received that governs. With respect to what the defendant did after he received the money by way of paying it back to certain persons is one of the many circumstances that you may consider as to the intent. But in reaching a determination as to the significance of such subsequent acts, you must take into consideration any motive that the defendant may have had in making such payments consistent with his personal interest at the time, as distinguished from the act of keeping a commitment that he intended to be bound by from the date of the inception of the receipt of the money."

lant, on direct examination and contrary to the testimony of various government witnesses (see statement *supra* and previous discussion in this argument), denied that he told Floyd Persons that he was going to use the monies he received from Persons "to buy somebody off in Washington, D.C." (Vol. I, p. 80; Vol. IV, p. 812); denied that he had ever had any dealings with Donna Schmaltz, who had testified that appellant had told her that he wished to conceal certain papers from the Interstate Commerce Commission (Vol. III, pp. 534-536; Vol. IV, p. 811); denied that he had ever given any "money-making" pamphlets to Dorothy Slavens (Vol. II, p. 418; Vol. IV, p. 795); and stated that, on behalf of Floyd Persons, he did see Assistant Secretary Karl Landstrom at the Interior Department in Washington, D. C., in efforts to obtain government land in exchange for scrip (Vol. IV, p. 817; Vol. III, pp. 620-623). Considering these and other direct conflicts of testimony, and further considering the government's proof, which, as we have previously mentioned had already exposed the extent of appellant's fraudulent schemes to defraud his creditors and the United States Treasury Department, the jury could well have concluded that appellant's loan defense, at least as to the year 1961, was a complete sham.

II

THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S ARGUMENT CONCERNING AN ALLEGED CHARITABLE CONTRIBUTION DURING THE YEAR 1961.

Appellant has presented an argument (Br. 34-35) that he is entitled to a deduction (presumably as a matter of law) for a certain charitable contribution of an alleged value of \$2,500.00 which he made during the year 1961 to the Rainbow Division of Oregon City, Oregon. The basis for appellant's argument is contained in Def. Ex. 271, introduced through Mrs. Marks, which purports to be evidence of a charitable contribution by appellant in February, 1961 to the Rainbow Division of the Police Department of Gladstone, Oregon for distribution to the needy. According to the testimony of Mrs. Marks, the merchandise listed in this exhibit came from a secondhand store in Southeast Portland operated by appellant under the name M & M Salvage Company. (Vol. IV, pp. 748-750). Attached to the signed receipt on the face of this exhibit is what purports to be a six page inventory (but three of these sheets are simply duplicate copies of the other), dated October 25, 1960, of the M & M Salvage Company store in Southeast Portland. Mrs. Marks testified that this entire inventory was given to the Rainbow Division, that this inventory had a cost price of about \$2,500.00 and that she had placed a value on this inventory at about the time of the

donation at the alleged "cost price" of \$2,500.00. (Vol. IV, pp. 748-750). To rebut appellant's evidence of a \$2,500.00 charitable contribution, the Government introduced into evidence (over defendant's objection) the 1960 corporate income tax return of the M & M Salvage Co. (Ex. 15), and the work sheet used by appellant's accountant, Mr. Kneeland, in preparing this return (Ex. 23A). Mr. Kneeland testified that the figures contained in the work sheet and listed on the return were based upon information received from appellant; that, in arriving at a figure for "cost of goods sold" of \$603.50, Mr. Kneeland used a beginning inventory of \$450.00, which was based on the preceding year's ending inventory valued at cost; that merchandise amounting to \$153.50 at cost price was purchased during the year; and that, as of December 31, 1960, the value of the inventory left in the store was zero, since the "store had been sold and was no longer in the ownership of the M & M Salvage at the end of the year." (See Ex. 15, Schedule A; Vol. IV, pp. 903-906). It is clear that, on the basis of Mr. Kneeland's testimony and the documentary evidence produced by the Government, the jury was free to either totally reject the testimony of Mrs. Marks or to assign a mere nominal value to the merchandise donated. Contrary to Mrs. Marks' claim that the merchandise cost about \$2,500.00, the corporate tax return disclosed a cost of only \$603.50. (Ex. 15).

After the Government had introduced this testimony in rebuttal, Mrs. Marks again took the witness stand and stated that the inventory list did not include certain furniture and fixtures which were also allegedly donated. (Vol. IV, pp. 917, 919-920). The defense also introduced through Mrs. Marks a newspaper clipping (Def. Ex. 275) allegedly portraying the merchandise donated to the Rainbow Division. The newspaper clipping, while tending to confirm the testimony of Mrs. Marks that *some* merchandise (and not necessarily the merchandise listed in Def. Ex. 271) was given to the Rainbow Division, hardly was of sufficient probative force on the question of value to compel the jury to make a finding of anything more than a nominal value. Indeed, even if the jury gave credence to Mrs. Marks' later testimony concerning the alleged donation of furniture and fixtures, the corporate income tax return (Ex. 15) of the M & M Salvage Co. shows the year end value (as of 12/31/60) of such equipment to be only \$401.00. (See Schedule G, Govt. Ex. 15.) Moreover, Mrs. Marks, on cross examination, stated that the merchandise and equipment in question was reposessed by the Marks in October, 1960, and admitted that "there could have been merchandise sold out of it after that." (Vol. IV, p. 920). Considering this admission of Mrs. Marks, and further considering that the corporate tax return, which was not filed until June 16, 1961 (Ex. 15), showed a year-end (as of 12/31/60) inventory

of zero, the jury could well have concluded that the merchandise was of such a poor quality as to be almost valueless. In short, even if we were to assume that the jury assigned some value to the charitable contribution testified to by Mrs. Marks, there was ample evidence to support the jury's verdict that such value was well below any amount needed to reduce the Government's unreported taxable income figure to a *de minimis* amount. The District Court was clearly correct in so holding (CT 100-101).

We note, moreover, that the burden of proving the charitable contribution was on the appellant. As testified to by the appellant's expert witness, Mr. Mitchell, appellant's deductible expenses, as shown on the schedule prepared by Mr. Mitchell (Def. Ex. 257), was discussed with Mrs. Marks. (Vol. IV, p. 892). While Mr. Mitchell testified that Mrs. Marks had mentioned this alleged charitable contribution to him in the course of his preparation of this expense schedule, this deduction was not listed in this schedule (Def. Ex. 257) which contained approximately \$40,000 in other expense deductions, and which was furnished to the Government prior to trial in an effort to dissuade prosecution. (Vol. IV, pp. 892-893) The first time the Government learned of this item was at the trial at the time Mrs. Marks testified. Accordingly, since appellant never claimed this alleged deduction on his 1961 tax return, and since no "lead" was pro-

vided by the taxpayer, the burden was on the appellant to show that he had deductions in addition to those claimed by him on his return. *Beck v. United States*, 298 F. 2d 622, 632 (C.A. 9); *Elwert v. United States*, 231 F.2d 928, 933 (C.A. 9).

Finally, on this point, appellant refers (Br. 40) to certain affidavits which he submitted to the lower Court in support of a motion for "judgment of acquittal." Since these affidavits were submitted after trial, the District Court more properly treated the affidavits as in support of a motion for new trial under Rule 33 (Federal Rules of Criminal Procedure) rather than in support of a motion for judgment of acquittal. It is fundamental that a motion for new trial is addressed to the discretion of the District Court and has to meet the following requirements:

"(1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal." *Pitts v. United States*, 263 F.2d 808, 810 (C.A. 9); *Fiorito v. United States*, 265 F.2d 658 (C.A. 9).

After carefully considering the affidavits filed by appellant (CT 18-29, 34-70, 78-82, 88-97), and the Government's opposition (supported by counteraffidavits) to the motion for new trial (CT 79-97), the District Court held as follows (CT 101):

"I have carefully considered the voluminous briefs filed by counsel for defendant and have analyzed the cited cases. I am convinced that the case was properly submitted to the jury and that defendant had a fair trial. The alleged newly discovered evidence was obviously available to the defendant at the time of trial. Moreover, such evidence would be only repetitive of that already in the record.

"Therefore, the defendant's motion for a judgment of acquittal and, in the alternate, for a new trial, must be denied."

We respectfully suggest that appellant's brief on appeal (Br. 40-45) totally fails to demonstrate how it was an abuse of discretion for the District Court to deny the motion for new trial. Appellant, in his brief, has simply summarized the affidavits presented to the District Court to support his argument that the "Rainbow Division", the alleged recipient of the donation, was organized and operated "exclusively for charitable purposes" within the meaning of Section 170 of the Internal Revenue Code of 1954. Assuming *arguendo* that such was the case, these affidavits

added nothing of substance to the only issue which, at the post trial stage, might have been material to the case, viz: the fair market value of the goods at the time of the donation in February, 1961. The Trial Court properly denied this motion.

III

THE DISTRICT COURT CORRECTLY HELD THAT THE GOVERNMENT PROVED A SUBSTANTIAL TAX DEFICIENCY.

Appellant claims (Br. 49-53) that the evidence failed to show a "substantial" tax deficiency for the year 1961, and that the additional tax proven by the government was "*de minimis*".

We note initially that the District Court carefully instructed the jury on the meaning of the term "substantial" as follows (Vol. IV, pp. 940-941):

"Now, the meaning of the word 'substantial,' as here used, depends upon the facts, circumstances, and conditions as shown by the evidence as to each particular count. Any amounts of unreported taxable income or tax greater than sums relatively small, under the particular circumstances pertaining thereto, are substantial.

“Any amounts of unreported taxable income or taxes should be disregarded which reasonably may be accounted for as due to error, oversight, or as reasonably considered inconsequential by a taxpayer.”

Appellant did not and legitimately could not offer any exception to the Court's charge, and the jury—by its verdict—obviously concluded that the Government had proved a substantial tax deficiency.

To the extent that appellant's argument is based on the proposition that the proven deficiency was not substantial as a matter of law, it is clearly without merit. The Government's evidence established that appellant's taxable income for the year 1961 amounted to \$1,877.43 with a resultant tax liability of \$375.49. Appellant, in his 1961 individual income tax return, reported a negative taxable income of \$178.91 and no tax liability. (Ex. 3) The Court will also recall (see statement, *supra*) that appellant reported negative taxable income figures and no tax liability in the year 1961 in the corporate returns of the Royal Acceptance Corporation and the Hetty Marks Foundation (Ex. 7, 17), the income and expenses of which were attributed to appellant individually by both sides. At the trial, appellant contended that in fact he sustained even greater tax losses (amounting to a negative taxable income of \$8,246.30 (Def. Ex. 258)) than claimed by him on his returns due to the existence of cer-

tain additional alleged expenses which were not claimed on his 1961 tax return. The Government, following the principle announced in *United States v. Beck*, 298 F.2d 622, 632 (C.A. 9), allowed every single item of expense claimed by appellant (Vol. IV, pp. 876-879, 888-893; Ex. 154),¹⁴ and still proved additional unreported income amounting to \$2,056.34.¹⁵

While it is true that the amount of this unreported income is not very large when considered *in vacuo*, we submit that it is more than "substantial" under the circumstances of this case and under the definition of "substantial" set forth in the decided cases. This Court has recently affirmed a judgment of conviction in the tax evasion case of *United States v. Heider*, 347 F.2d 695 (C.A. 9), wherein the District Court noted (231 F. Supp. 223, 235-236 (D.C. Ore.)):

¹⁴ The only difference between the Government's expense figures, and those of appellant, consisted of an additional \$476.51 in medical expenses claimed by appellant as the amount which constituted in excess of 3% of adjusted gross income. Appellant's expert witness agreed that this additional amount would be allowed only if the jury accepted appellant's contention that he had no adjusted gross income. Otherwise the Government's medical expense figure — based upon the adjusted gross income computed by the Government — would be correct. (Vol. IV, pp. 876-879, 888-893).

¹⁵ Appellant's corrected taxable income of \$1877.43 plus negative taxable income of \$178.91 reported by him on his 1961 tax return amounts to additional taxable income of \$2056.34.

“The proof showed beyond any doubt that the defendants attempted to cheat the Government by wilfully understating Heider’s net income. The Government concedes that in order to find the defendants guilty, I must find that Heider owed a tax.

“In my view, if a taxpayer reports a large loss when he has a net taxable income which he wilfully failed to divulge, he is guilty of a violation of the income tax law *even though the amount of the net taxable income is comparatively small*. United States v. Nunan, 2 Cir. 1956, 236 F.2d 576, 585.”

[Emphasis supplied.]

In the *Nunan* case, referred to by the District Court above, the Second Circuit—after reviewing the evidence pertaining to the Government’s proof of a substantial tax deficiency—offered the following cogent comments on this point (at pp. 585-586):

“None of these items can be considered *in vacuo*. Nor does the sum of them tell the story. Viewed in perspective against the background of the case as a whole we cannot say that the evidence required a ruling that the jury must render a verdict of acquittal. The showing by the government must warrant a finding that the amount of the tax evaded is substantial. Tinkoff v. United States, 7 Cir., 86 F.2d 868; United States v. Schenck, 2 Cir., 126 F.2d 702; Graves v. United States, 10 Cir., 191 F.2d 579. But this is not measured in terms of gross or net income nor by any particular per-

centage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration. Here the total gross income reported by appellant in 1946 was \$67,823.57 and in 1950, \$143,239. But a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution, depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax law with impunity.

* * *

“*** each tax evasion case must rest on its own bottom. This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. It is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense.”

In line with the *Nunan* and *Heider* decisions, there are several other tax evasion cases involving relatively small amounts in which convictions have been upheld where (as here), the understatements were considered on a percentage basis and held to be substantial.

In *Janko v. United States*, 281 F.2d 156, 163 (C.A. 8), reversed on other grounds 366 U.S. 716, the defendant had improperly claimed dependency exemptions for minor children living with his divorced wife.

The tax evaded was \$134.00 in 1954 and \$264.00 in each of the following two years. Janko contended that the evasion was not substantial because the dollar amounts were small. His conviction on the first count was reversed on other grounds, but the Court of Appeals sustained Janko's conviction for 1955 and 1956. The Court held that "on a percentage basis the amount involved is large" (at page 163). Since Janko had reported a tax of \$549.00 and \$450.00 for 1955 and 1956, respectively, he had evaded approximately 32% and 37% of his correct tax for the years involved.

In another case (*United States v. O'Day*, 186 F. Supp 572 (D. Del.), the indictment charged that the defendants filed a return reporting an income tax of \$218.00, whereas \$2,956.84 was actually due. At the trial the government offered proof that the correct liability was only \$992.50. The defendants admitted a liability of \$895.42. The District Court denied a motion for acquittal, holding that the variance between the tax liability charged in the indictment and the amount proved at the trial was not fatal. The Court said that "a conviction may be sustained if a taxpayer willfully attempts to evade or defeat any substantial portion of the tax." (at pp. 573-574).

In *United States v. Cindrich*, 140 F.Supp 356 (W.D. Pa.), affirmed 241 F.2d 54, 57 (C.A. 3), where the

reported tax was much greater than in the cases just discussed, the Court also indicated that a percentage approach is important. Cindrich's reported gross receipts of \$133,111.77 did not include ten checks totaling \$4,689.60. He should have paid \$9,124.78 in taxes, but paid only \$7,182.78, the underpayment being somewhat over 20% of the correct tax, and the District Court concluded that the deficiency was substantial. See also *Gendelman v. United States*, 191 F.2d 993, 996 (C.A. 9), *cert. denied* 342 U.S. 909; *Goldbaum v. United States*, 204 F.2d 74, 78 (C.A. 9), *cert. denied* 346 U.S. 831; *Canaday v. United States*, 354 F.2d, 849 (C.A. 8).

In the instant case, appellant reported no tax due and owing (and a negative tax liability) for the year 1961 when in fact his tax liability amounted to \$375.49. In short, appellant evaded well over 300% of his correct tax for that year, which is clearly "substantial" under the rationale of the decided cases.

We note, moreover, that the requirement of a "substantial" tax deficiency had its beginning in the net-worth type of case where the Government seeks to prove tax deficiencies by a circumstantial, indirect method of proof. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, there is a serious

danger that errors could arise (such as in the area of depreciation, opening net worth, cash on hand, etc.) which would make the net worth increases more apparent than real. No such dangers are present in the ordinary "specific-item" type of case, such as here, where the Government simply seeks to show an omission from income of definite items in certain amounts from ascertainable sources. We believe that this is what the Second Circuit, in the *Nunan* case, *supra*, had in mind when, in affirming a tax evasion conviction in a specific item case, it stated (236 F.2d at p. 586):

"This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. It is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense."

By the same token, the Eighth Circuit, in the *Janko* case, *supra*, in affirming that specific item conviction, noted that the defendant's argument concerning the lack of a substantial tax deficiency "was directed to a net worth case and necessary intent" (281 F.2d at p. 163).

Finally, on this point, it is interesting to note that the District Court—in the *Cindrich* case, *supra*, in up-

holding a conviction in a specific items case where the amount of tax evaded was comparatively small, squarely held (140 F.Supp at p. 360) that "a substantial deficiency in net income is not required" in a specific item case and that "only in cases where the proof of the felony is circumstantial, such as in net worth cases where the gross income is approximated, is it necessary to show that a substantial amount was omitted from the reported income. Cf. *Leeby v. United States*, 8 Cir., 1951, 192 F.2d 331." In affirming this conviction, the Fifth Circuit significantly held as follows (241 F.2d 57):

"Appellant also urges the District Judge erred in refusing to charge the following request:

"Where a taxpayer engaged in business has reported a large sum as gross receipts of such business but has failed to report a small amount of additional receipts, the smallness of the unreported receipts in itself gives rise to an inference that the failure to report the additional receipts was not done willfully."

"The amount of deficiency is not a consideration on the question of the guilty knowledge or the intent element of the crime, *although it may be an important element where the deficiency itself is in issue as in a net worth prosecution*. The issue before us is not whether the defendant defrauded the government of a substantial sum but whether the deficiency

was due to fraud. The disparity between total receipts and the amount of income unreported is not helpful on that problem. In many business enterprises net income represents a very small percentage of total receipts and the above instruction suggests the strange proposition that the failure to report income justifies an inference of the good faith of the defendant. Generally that type of instruction is not demandable as a matter of right, *United States v. Pannell*, 3 Cir., 1949, 178 F.2d 98. In this trial it would have been affirmatively wrong and the trial judge properly denied it. A review of the instructions on wilfulness and fraudulent intent indicates appellant was accorded the full measure of his rights as defined in *Spies v. United States*, *supra*. *Holland v. United States*, *supra*, and its companion decisions. This case was properly submitted to the jury under the charge of the court." [Emphasis supplied.]

In sum, there is authority for an argument that the concept of a substantial tax deficiency has no application in a specific items case. However, we respectfully submit that the Court need not reach this issue since the deficiency in the instant case — as previously shown — is entirely adequate to sustain the conviction.

IV

THERE WAS NO ERROR IN FAILING TO INFORM THE JURY OF THE APPLICABLE RATE OF TAX

Appellant asserts (Br. 45-49) that a new trial is required since the jury was not informed of the tax rate to be applied in computing the tax deficiency. More specifically, appellant asserts that the jury may have found an unreported taxable income figure less than that proved by the Government, and alleges that in such a case the jury would not have been able to apply the appropriate rate of taxation to this unreported income in order to arrive at a tax deficiency. The point is without substance.

We note initially that appellant did not raise this point at any time during the trial. Appellant neither cross-examined the Government's expert witness, Mr. Klass, on the applicable rate of taxation nor requested a jury instruction on the rate to be applied to either the Government's unreported income figure or any lesser amount. Accordingly, the Trial Court rejected this argument raised below in appellant's motion for a new trial as follows (Ct. 99):

"One of the defendant's principal complaints is that the Court did not inform the jury on the tax rate to be applied in computing the tax deficiency. It is evident that neither the

Government, nor defendant's counsel, were of the belief that these schedules and rates should be submitted to the jury. No requested instructions on that point were submitted, nor was the question in any way raised by the defendant. Obviously, at the time of the trial, all participants, including the Court, felt that the tax deficiency, if any, was a subject for expert testimony. Manifestly, the theory that the rate schedules should have been submitted to the jury is an afterthought on the part of counsel for defendant. The trial of the case consumed in excess of five days. I do not believe that the defendant should be now permitted to raise this question."

Since the matter was not raised at the trial, it is fundamental that appellant—to obtain a new trial—must fall within the "plain error" provision of Rule 52, Federal Rules of Criminal Procedure, which provides that:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

We submit that no error exists and that, in any event, no prejudice requiring the operation of this rule has been or can be shown in the circumstances of this case.

First, we will conjecture with the appellant and will assume *arguendo* that the jury may have arrived at a lower unreported taxable income figure than that

claimed by the Government. Given this assumption, appellant is presumably arguing that it was incumbent upon the Government to pursue either of two alternatives: (1) introduce through its expert witness calculations of tax deficiencies with respect to every possible amount of unreported income between zero and the amount of unreported income claimed by the Government; or (2) inform the jury of the relevant tax bracket (in this case twenty percent) and let the jury perform the multiplication with respect to the unreported income found. We respectfully suggest that the first alternative is absurd on its face, and that the second alternative was solely a matter of defense. When the Government rested its direct case, the jury had before it sufficient evidence to conclude that a *prima facie* case had been established, i.e., that the appellant had wilfully attempted to evade a substantial portion of his taxable income and tax. At that point, it was up to the appellant to come forward with evidence to show that the Government had overstated his taxable income. This the appellant did by his claim that a great portion of the monies received constituted loans and not income and his further claim of an alleged \$2,500.00 charitable contribution. To the extent that the jury may have believed any of the defense evidence, it is clear that the Government's unreported income figure would have been reduced accordingly. While the jury—by its verdict—obviously

rejected the appellant's proof, the point we are making is that it was incumbent upon the appellant to prove that he had a lower unreported taxable income (or no taxable income at all) than that claimed by the Government. Indeed, defense counsel repeatedly stressed to the jury throughout the trial that if it found certain of the items to be loans, the defendant's taxable income would be either entirely wiped out or reduced to *de minimis* amounts. In short, it was up to the appellant to inform the jury of the rate of taxation to be applied to any lower unreported income figure it may have determined to be due.

Second, the only case we have found in which this issue was raised holds squarely against appellant's position herein. In the case of *Watts v. United States*, 212 F.2d 275 (C.A. 10),¹⁸ the Government introduced evidence at trial establishing substantial unreported income but did not introduce any evidence, expert or otherwise, to show the additional tax which was due and owing based on the unreported income. On appeal, the defendant contended that this failure to inform the jury of the additional tax due was error. The Court of Appeals rejected this argument as follows: (at p. 277):

¹⁸ This case was remanded by the Supreme Court on other grounds for further consideration in 348 US 905, and the conviction was again upheld in 220 F.2d 483, cert. den. 349 US 939.

"It was not necessary that the Government introduce evidence as to the exact amount of the additional tax due. To make a case for the jury, it was sufficient that the Government present substantial evidence from which the jury could find that a substantial amount of net income was not reported and that the failure to so report it was wilful and intentional. *When once that was established, the amount of the additional income tax remained unimportant because it would follow as a matter of course that a substantial amount of additional tax remained due and unpaid.* The exact amount of such tax was not an essential element of the offense with which appellant was charged." [Emphasis supplied.]

In the instant case, unlike *Watts*, the jury had before it expert testimony on the amount of the additional tax due over that reported by appellant on his 1961 tax return. It would therefore follow *a fortiori* from *Watts* that there was no requirement to also inform the jury of the applicable rate of tax.¹⁷

¹⁷ We have examined the appellate record in the *Watts* case (No. 4736 — C.A. 10 — filed September 18, 1953), which reveals that the jury was not informed of either the additional tax owed by the defendant or the applicable tax rate. The jury had before it only the amount of additional net income claimed by the Government. The District Court in that case charged the jury as follows: (R. 246)

"It is not necessary, ladies and gentlemen of the jury, that the government prove the amount of understatement here alleged in the indictment exactly. It is enough if you find that the income was understated in a substantial amount, any substantial amount.

"Neither is it necessary, ladies and gentlemen of the jury, for the government to tell you exactly what is the

We believe that the case of *United States v. Nunan*, 236 F.2d 576 (C.A. 2), also supports the Government's position. In that case, the appellant (who was convicted of tax evasion) contended on appeal that the Government's evidence failed to support a finding that numerous cash bank deposits and disbursements made by him during the prosecution years constituted taxable income. The Court of Appeals rejected this argument as follows (236 F.2d at pp. 585-586):

"Here, even if the jury had been unable to agree with the contentions of the government to the effect that the cash deposits and disbursements constituted, to the extent alleged, taxable income, still a verdict of guilty would have been warranted by the proof of specific unreported items, viewed in the light of the evidence taken as a whole.

* * *

tax which would result from that understatement, because the tax follows as a matter of law from a determination of whatever income was earned which should have been reported."

It is evident, therefore, that the above italicized language of the Court of Appeals in *Watts* is a necessary holding in the case and not simply *dicta*.

We point this out for the benefit of appellant's counsel as well as the Court since, in the haste of preparing a memorandum on this point in the lower Court, we did not have time to obtain the appellate record in *Watts*, and we erroneously informed opposing counsel that the language in question was only *dicta* in the case.

We might point out to the Court that in the numerous tax evasion cases tried in this and other circuits, the jury is not apprised of the tax rates and the calculations of both the unreported income and tax are made by the respective expert witnesses for both sides.

“*** each tax evasion case must rest on its own bottom. This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. *It is not necessary to prove that there was a particular amount of tax evaded* nor need the computations be exact in an accounting sense.” [Emphasis supplied]

In short, the Second Circuit had no difficulty in trusting the jury to determine an ultimate substantial tax deficiency—even if the jury arrived at a lesser unreported income figure than that claimed by the Government. Again, the Second Circuit stressed that the important feature was the understatement of taxable income and tax and not the “particular amount of tax evaded”.¹⁸

¹⁸ The *Nunan* case involved evasion of taxes for the years 1946 to 1950, inclusive. An examination of the appellate record in the *Nunan* case (No. 43078 - C.A. 2) at pages 604-621 and 1145-1159 reveals that the jury in that case did not have before it the rates of taxation to be applied to the unreported income for the years 1946, 1947, and 1948. For the years 1949 and 1950, the Government's expert witness, in answer to an inquiry from the Court concerning the tax “bracket” of the defendant, stated that he did not have the tax rate tables with him in Court and hence could not answer the question precisely. The prosecuting attorney in that case stated that, from his examination of the taxable income, the brackets for those two years appeared to be about 70% and 66%, respectively. These comments of the prosecuting attorney were offered only with respect to the taxable income proven by the Government for the years 1949 and 1950, and not with respect to any lesser taxable income figure claimed by the defendant.

Finally, we believe that it is appropriate to note, as stated in *Leeby v. United States*, 192 F.2d 331, 334 (C.A. 8), that tax evasion prosecutions are not proceedings to collect the amount of tax alleged to be due, and it is not necessary to determine the exact amount of the defendant's income for the years in question. All that the Government need show is that a substantial amount was omitted from reported income. To the same effect see *Fischer v. United States*, 212 F.2d 441, 443 (C.A. 10); *Watts v. United States*, 212 F.2d 275, 277 (C.A. 10); *Smith v. United States*, 236 F.2d 260, 264 (C.A. 8); *Montgomery v. United States*, 203 F.2d 887, 892 (C.A. 5); *Graves v. United States*, 191 F.2d 579, 582 (C.A. 10); *Gendelman v. United States*, 191 F.2d 993, 996 (C.A. 9). In the instant case, the jury had before it evidence that appellant had omitted over \$6300.00 from gross income, and after the allowance of every deduction claimed by him (Vol. IV, pp. 876-879, 888-893), still had additional unreported taxable income of over \$2,000.00. Had the jury found a lower unreported income, and had it been troubled in seeking what rate to apply, it could readily have requested an additional instruction or other assistance from the Court which could then have simply instructed the jury as a matter of law concerning the appropriate rate.¹⁰ No such assistance

¹⁰ We note, moreover, that the jury did request the Court's advice on another matter during their deliberations. (Vol. IV, p. 967).

was requested by the jury. Jurors are also taxpayers, and as such are generally familiar with rates of income taxation particularly (as here) in the lower tax brackets, and, in any event, as people of affairs and intelligence would know that an unreported taxable income gives rise to an unreported tax liability. In short, we respectfully note our agreement with the general proposition expressed by the Supreme Court that we should not lightly accept an argument which "tacitly assumes that juries are too stupid to see the drift of evidence." *United States v. Johnson*, 319 US 503, 519.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be affirmed.

SIDNEY I. LEZAK

United States Attorney

District of Oregon

JACK G. COLLINS

First Assistant United States Attorney

NORMAN SEPENUK

Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: day of November, 1967.

NORMAN SEPENUK

Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLYNN MILLER JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

RONALD S. MORROW
Assistant U. S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I STATEMENT OF JURISDICTION	1
II STATUTE INVOLVED	2
III QUESTION PRESENTED	3
IV STATEMENT OF FACTS	3
V ARGUMENT	5
THE EVIDENCE RELATING TO THE SALE OF ANOTHER STOLEN NEGOTIABLE IN- STRUMENT WAS PROPERLY ADMITTED TO SHOW THE APPELLANT'S INTENT.	5
VI CONCLUSION	7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Carlino v. United States, 390 F. 2d 624 (9th Cir. 1968)	5
Fineberg v. United States, 393 F. 2d 417 (9th Cir. 1968)	5
Henderson v. United States, 143 F. 2d 681 (9th Cir. 1944)	6
Loux v. United States, 389 F. 2d 911 (9th Cir. 1968)	5
Reed v. United States, 364 F. 2d 630 (9th Cir. 1966), cert. denied 386 U.S. 918	5
Theobald v. United States, 371 F. 2d 769 (9th Cir. 1967)	5

<u>Statutes</u>	
Title 18 U.S.C. , §641	1-2
Title 18 U.S.C. , §3231	2
Title 28 U.S.C. , §1291	2
Title 28 U.S.C. , §1294	2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLYNN MILLER JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On February 2, 1967, the United States Attorney for the Central District of California, filed a one-count misdemeanor information against Glynn Miller Johnson for the unauthorized sale of property in violation of Title 18, United States Code, §641 [C. T. 3]. ^{1/} Following a trial by jury before the Honorable John W. Delehant, Senior United States District Judge, ^{2/} from

^{1/} "C. T. " refers to the Clerk's Transcript.

^{2/} Sitting by designation of Chief Justice Earl Warren.

February 2 to February 3, 1967, appellant was found guilty [C. T. 2].

Appellant was convicted and sentenced on March 6, 1967, to the custody of the Attorney General for six months [C. T. 7]. On March 6, 1967, a timely notice of appeal was filed [C. T. 9].

On March 27, 1968, the appeal was dismissed for lack of prosecution.

On August 16, 1968, this Court reinstated the appeal.

The District Court had jurisdiction under the provisions of Title 18, United States Code, §§641 and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, §§1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, §641, provides, in pertinent part:

"Whoever . . . without authority, sells, conveys or disposes of . . . any thing of value of the United States or of any department or agency thereof; . . .

"Shall be fined not more than \$10,000, or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than

\$1,000 or imprisoned not more than one year,
or both.

"The word 'value' means face, par, or
market value, or cost price, either wholesale
or retail, whichever is greater."

III

QUESTION PRESENTED

Whether the following evidence should have been admitted
as proof of a prior similar act to show intent:

A. Testimony, without objection, relative to a sale,
made by appellant, three days before the date of the offense
alleged in the information, of a stolen cashier's check without
authority, and

B. A stolen cashier's check sold by appellant three
days before the date of the offense alleged in the information.

IV

STATEMENT OF FACTS

On September 24, 1966, Glynn M. Johnson sold a stolen
cashier's check to Leslie Finder with funds provided by Stephen
Kessler for \$13.50 [Ex. 3, R. T. 83, 60-61, 106].^{3/} At that
time Johnson said he had quite a few postal money orders ranging

^{3/} "R. T. " refers to the Reporter's Transcript.

from 60 to 80 dollars each, totaling approximately \$800 which he could sell for around \$500 [R. T. 51, 85]. At, or about the same time Johnson said he had connections for different types of money orders and he showed Finder and Kessler a postal money order [R. T. 84].

On September 27, 1966, while being followed by postal inspectors, Finder and Kessler met with Johnson and proceeded to Johnson's house with Johnson [R. T. 54-56]. Following some negotiation, Finder handed Johnson \$50 in return for Exhibit 1, a postal money order [R. T. 56-58]. The money consisted of two twenties and a ten [R. T. 58]. Before Johnson handed Finder Exhibit 1 he wiped it clean and placed it into an envelope, Exhibit 2 [R. T. 58].

Exhibit 1, the postal money order referred to in the information, was stolen from the Post Office at Picacho, Arizona [R. T. 43], and the Postmistress did not authorize anyone to sell it.

Exhibit 3, the cashier's check, was stolen between July 31, 1966, and August 1, 1966, from a grocery store owned by Harry W. Wong [R. T. 106].

At the time of Johnson's arrest he had in his hand one of the twenties given Kessler by a postal inspector (Exs. 4, 5; R. T. 112, 115).

ARGUMENT

THE EVIDENCE RELATING TO THE SALE
OF ANOTHER STOLEN NEGOTIABLE IN-
STRUMENT WAS PROPERLY ADMITTED
TO SHOW THE APPELLANT'S INTENT.

Evidence of other crimes is admissible to prove intent and to prove the absence of mistake or accident. Fineberg v. United States, 393 F.2d 417 (9th Cir. 1968); Carlino v. United States, 390 F.2d 624 (9th Cir. 1968); Loux v. United States, 389 F.2d 911 (9th Cir. 1968); Theobald v. United States, 371 F.2d 769 (9th Cir. 1967); Reed v. United States, 364 F.2d 630 (9th Cir. 1966), cert. denied 386 U.S. 918.

At the trial, appellant objected to the introduction of Exhibit 3, a stolen cashier's check, sold by him on September 24, 1966, on the grounds that it was irrelevant and immaterial and at R. T. 108, on the ground that it was prejudicial because he had not had time to prepare a defense.

The appellee can find no objection made to the testimony relative to Exhibit 3. Finder and Kessler testified relative thereto, without objection, and the defense cross-examined each.

The fact is that the testimony relative to Exhibit 3, and the exhibit itself, proved that Johnson's act of selling Exhibit 1 was not a mistake. On two proven occasions Johnson sold the property of another without authority. Appellant here urges that

both sales were not of property of the United States. No authority is given or cited for the proposition that such a consideration is relevant.

Appellant appears to urge that in the absence of an admission of the act, evidence relevant to intent is inadmissible. Such is not the law. Henderson v. United States, 143 F.2d 681 (9th Cir. 1944).

Appellant objects to a statement in the argument of the prosecutor relative to there being evidence of Johnson being in the business of selling "hot money orders or stolen money orders." Appellant points out that the testimony relative to Exhibit 3 was to prove intent. However, there was evidence that Johnson had other postal money orders for sale with a face value of approximately over \$800 [R. T. 51, 85].

Appellant alludes briefly to a dissatisfaction with the Court's instructions. It appears that such objection, if any, is too late, especially in light of appellant's counsel's statement after the charge that he had no exceptions thereto [R. T. 213].

VI

CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.

United States Attorney

ROBERT L. BROSIO

Assistant U. S. Attorney

Chief, Criminal Division

RONALD S. MORROW

Assistant U. S. Attorney

Attorneys for Appellee

United States of America

United States Court of Appeals

FOR THE NINTH DISTRICT

—
No. 21990
—

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

—
*On Petition for Review of Orders of the
Federal Communications Commission*
—

FILED

BRIEF FOR PETITIONER

OCT 9 1967

WM. B. LUCK, CLERK

JOHN P. COLE, JR.
ROGER E. ZYLSTRA
ALAN RAYWID

Munsey Building
Washington, D. C. 20004

Attorneys for Petitioner

Of Counsel:

COLE, ZYLSTRA & RAYWID

Munsey Building

Washington, D. C. 20004

October 6, 1967

OCT 11 1967

INDEX

	<u>Page</u>
TABLE OF CASES	(iii)
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
1. History of CATV	3
2. CATV Regulations	5
3. CATV in Bellingham, Washington	10
4. The Proceedings Before the FCC	12
SPECIFICATION OF ERRORS	12
ARGUMENT:	
I. The Federal Communications Commission Lacks Statutory Authority to Regulate Petitioner's CATV Business	13
A. The Communications Act Does Not Provide for Regulation of Non-Licensee Community Antenna Television Systems, Engaged in the Reception and Distribu- tion of Television Signals	13
1. Title II (Common carriers) and Title III (Radio) of the Communica- tions Act Are Mutually Exclusive, Providing Separate Schemes of Regulatory Control, Neither of which Apply to Reception and Distribution by Cable	15
2. Title III Pertains to Radio Transmis- sion, Rather than Reception and Distribution by Cable, and Establishes a System of Licensing Regulation	19
B. An Administrative Ruling Recognized by the Courts and Acquiesced to by Congress Has the Force of Law and Can- not be Overturned by the Agency	26

(ii)

	<u>Page</u>
II. The Commission's CATV Rules Are in Violation of the First and Fifth Amendments of the Constitution	32
A. The Non-Duplication Rule Restricting the Reception and Distribution of Television Signals is in Violation of the First Amendment	32
B. The Issuance of a Summary Order by an Administrative Agency Threatening Property Rights is a Denial of Due Process in Violation of the Fifth Amendment	37
III. Failure To Provide for an Evidentiary Hearing in Modifying Petitioner's Business is in Violation of Pertinent Statutes and Regulations	40
A. Existing Statutes and Regulations Require a Hearing Prior to Modification or Revocation of an Existing Business	41
B. A Waiver Petition Containing Substantial and Material Issues of Fact Requires an Evidentiary Hearing	45
C. The Issuance of a Proscriptive Order Against a Non-Licensee Without a Hearing is in Violation of Section 312 of the Communications Act	49
D. Enforcement of Exclusivity Provision by the Local Broadcaster is an Unreasonable Restriction and Delegation of Authority	51
E. The "Storer Doctrine" Supports a Hearing in a Waiver Petition and Before Issuance of a Proscriptive Order on the Merits	53
CONCLUSION	58
CERTIFICATE	60
APPENDICES	1a

Page

A.	Legislative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction Over CATV	1a
B.	Statutes and Administrative Rules	35a

TABLE OF CASES

Cases:

<i>American Airlines, Inc. v. Civil Aeronautics Board,</i> 359 F. 2d 624	53, 55, 56, 57
<i>American Broadcasting Co. v. United States,</i> 110 F. Supp. 374	33
<i>American Trucking Association v. Federal Communications Commission,</i> 377 F. 2d 121	48
<i>Ashbacker Radio Co. v. Federal Communications Commission,</i> 326 U.S. 327	46
<i>Baltimore & Ohio Railway Co. v. Jackson,</i> 353 U.S. 325	30
<i>Bantam Books, Inc. v. Sullivan,</i> 372 U.S. 58	34
<i>Bates v. City of Little Rock,</i> 361 U.S. 516	34
<i>Buckeye Cablevision, Inc. v. Federal Communications Commission,</i> ____ F. 2d ____ (District of Columbia Circuit, No. 20,274, decided June 30, 1967) . . .	24, 31, 49
<i>Cable Vision, Inc. v. KUTV, Inc.,</i> 335 F. 2d 348	28, 52
<i>Cammarano v. United States,</i> 358 U.S. 498	31
<i>Carroll Broadcasting Co. v. Federal Communications Commission,</i> 258 F. 2d 440	55, 56

	<u>Page</u>
<i>Carter Mountain Transmission Corp. v. Federal Communications Commission,</i> 321 F. 2d 359	35
<i>Civil Aeronautics Board v. Delta Air Lines,</i> 367 U.S. 316	37, 41, 48
<i>Corn Products Refining Co. v. Commissioner of Internal Revenue,</i> 350 U.S. 46	26
<i>DeJonge v. Oregon,</i> 299 U.S. 353	34
<i>Ex Parte Jackson,</i> 96 U.S. 727	33
<i>Farmer's Union v. WDAY,</i> 360 U.S. 525	35
<i>Federal Communications Commission v. American Broadcasting Co.,</i> 347 U.S. 284	21, 33
<i>Federal Communications Commission v. Sanders Brothers Radio Station,</i> 309 U.S. 470	52, 55
<i>Federal Power Commission v. Texaco,</i> 377 U.S. 33	53, 54, 58
<i>Folkways Broadcasting Co. v. Federal Communications Commission,</i> 375 F. 2d 299	46, 48
<i>Fribourg Navigation Co. v. Commissioner of Internal Revenue,</i> 383 U.S. 272	26, 31
<i>Gonzalez v. Freeman,</i> 334 F. 2d 570	39
<i>Griswold v. Connecticut,</i> 381 U.S. 479	33
<i>Grossjean v. American Press Co.,</i> 297 U.S. 233	34
<i>Hannah v. Larche,</i> 363 U.S. 420	37, 38
<i>Helvering v. Winmill,</i> 305 U.S. 79	26

	<u>Page</u>
<i>Idaho Microwave, Inc. v. Federal Communications Commission,</i> 352 F. 2d 729	35
<i>Interstate Broadcasting Company v. Federal Communications Commission,</i> 352 F. 2d 797	48
<i>J. G. Baswell Company v. Commissioner of Internal Revenue,</i> 302 F. 2d 682	26
<i>Joseph Burstyn, Inc. v. Wilson</i> 343 U.S. 495	34
<i>Lafayette Radio Electronics Corp. v. Federal Communications Commission,</i> 345 F. 2d 278	35
<i>LaMont v. Postmaster General,</i> 381 U.S. 301	33
<i>Lovell v. City of Griffin,</i> 303 U.S. 444	33, 34
<i>Martin v. Struthers,</i> 319 U.S. 141	33
<i>National Broadcasting Co. v. United States,</i> 319 U. S. 190	34
<i>National Labor Relations Board v. Gullett Gin Co.,</i> 340 U.S. 361	26
<i>Near v. Minnesota,</i> 238 U.S. 697	34
<i>Norwegian Nitrogen Products Co. v. United States,</i> 288 U.S. 294	26
<i>Pan American Petroleum Corp. v. Federal Power Commission,</i> 352 F. 2d 241	54
<i>Philadelphia Television Broadcasting Co. v. Federal Communications Commission,</i> 359 F. 2d 282	16
<i>Regents of the University of Georgia v. Carroll,</i> 338 U.S. 586	14, 20
<i>Saia v. New York,</i> 334 U.S. 558	33
<i>Seatrains Lines v. United States,</i> 64 F. Supp. 156	37

	<u>Page</u>
<i>Sherbert v. Verner</i> , 374 U.S. 398	33
<i>Southwestern Cable Co. v. United States</i> , 378 F. 2d 118	20, 38, 39, 44, 50, 51
<i>Standard Airlines, Inc. v. Civil Aeronautics Board</i> , 177 F. 2d 18	38, 43
<i>Sun Oil Co. v. Federal Power Commission</i> , 355 F. 2d 181	54
<i>Superior Oil Co. v. Federal Power Commission</i> , 322 F. 2d 601	38, 57
<i>Telanserphone, Inc. v. Federal Communications Commission</i> , 231 F. 2d 732	48
<i>Television Corp. of Mich., Inc. v. Federal Communications Commission</i> , 294 F. 2d 730	48
<i>Times Film Corp. v. City of Chicago</i> , 365 U.S. 43	34
<i>United States v. American Trucking Association</i> , 310 U.S. 534	26
<i>United States v. Leslie Salt Co.</i> , 350 U.S. 383	26
<i>United States v. Storer Broadcasting Co.</i> , 351 U.S. 192	38, 53, 54, 58
<i>Weaver v. Jordan</i> , 64 Cal. 2d 235, 411 P. 2d 289	33
<i>Winters v. New York</i> , 333 U.S. 507	33

Administrative Decisions:

	<u>Page</u>
<i>Frontier Broadcasting Co. v. Collier</i> , 24 F.C.C. 251	27
<i>Total Telecable, Inc.</i> , 7 F.C.C. 2d 611	2, 12, 46, 47, 50
<i>Total Telecable, Inc.</i> , 8 F.C.C. 2d 388	40
<i>Total Telecable, Inc.</i> , 8 F.C.C. 2d 997	2, 12
<i>WSTV, Inc. v. Fortnightly Corp.</i> , 23 Pike & Fischer R.R. 184	27

Statutes:**United States Constitution,**

Amendment I	13, 32, 33, 34, 36
Amendment V	13, 37, 38, 40

Administrative Procedure Act, 5 U.S.C. Sections:

551, et seq.	40, 41
551(6)	44
551(7)	44
551(8)	45
551(9)	45
554	41
556	41
557	41
558	44

Communications Act of 1934, 47 U.S.C., Sections:

151, et seq.	14, 40, 41
151	16
152(a)	16
153(a)	16, 17, 19
154(i)	14, 17, 20, 22, 51
201-222 (Title II)	15, 17, 18, 19
301-397 (Title III)	15, 17, 18, 19, 21, 22, 23

	<u>Page</u>
303 (f)	14, 17, 22
303 (h)	14, 17, 22
303 (m) (2)	41
303 (p)	14
303 (r)	14, 20, 22, 51
303 (s)	24, 25
307 (b)	14, 17, 23, 24
309	45, 49
309 (e)	41, 45
312	50, 51
312 (c)	41
312 (d)	41
315	14
316	41
317	14
326	34, 35, 36
330	24, 25
402 (a)	2
508	14
Federal Aviation Act of 1958, 49 U.S.C. Sec. 1371 (g)	42
Federal Trade Commission Act, 15 U.S.C. Section 45 (a)	52
Interstate Commerce Act, 41 Stat. 475	17
Judicial Review Act, 28 U.S.C. Sec. 2342, 2343	2
Radio Act of 1927, 47 U.S.C. 81 et seq.	16, 19, 21, 22, 23
111	17
 <u>Administrative Rules:</u>	
Federal Communications Commission, 47 C. F. R. Sections:	
1.52	46

	<u>Page</u>
1.85	42
1.87	42
1.91	42
74.1103	12, 13, 32, 42, 46
74. 1103 (e)	1, 2, 12, 42, 49
74. 1103 (f)	51
74. 1107 (d)	24, 42
74. 1109	42, 47
74. 1109 (f)	42, 50

Miscellaneous:

Administrative Reports, Orders and Notices:

First Report and Order (CATV) 38 F.C.C. 683 (1965)	3, 7, 8, 42
In re Incidental and Restricted Radiation Devices, Third Report and Order, 21 Fed. Reg. 5366, 13 Pike & Fischer R.R. 1546a (1956)	5, 27
In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order, Docket No. 12443, 26 F.C.C. 403 (1959)	5, 6, 27
Joint Notice of Inquiry and Notice of Proposed Rule Making in Docket 15971, 1 F.C.C. 2d 453 (1965)	8, 9
Notice of Proposed Rule Making in Docket 14895, 27 Fed. Reg. 12586 (1962)	7
Notice of Proposed Rule Making in Docket 15233, 28 Fed. Reg. 13789 (1963)	7
Report and Order in Docket 12443, 26 F.C.C. 403 (1959)	5
Second Report and Order (CATV), 2 F.C.C. 2d 725 (1966)	7, 9, 10, 14, 29, 35, 47, 50

Legislative Bills:

S. 2653, 86th Congress, 1st Sess. (1959)	6, 29
S. 1044, 87th Congress, 1st Sess. (1961)	6, 29
H. R. 6864, 87th Congress, 1st Sess. (1961).	6, 29
H. R. 13286, 89th Congress, 2nd Sess. (1966)	29, 30

Congressional Record:

67 Cong. Rec. 5479 (1927)	23
105 Cong. Rec. 6753 (1959)	28
106 Cong. Rec. 10520, 10547 (1960)	29
107 Cong. Rec. 2523 (1961).	29

Congressional Reports:

Senate Report No. 781, 73rd Cong.	18
Senate Report 923, 86th Cong., 1st Sess. (1959)	29
Senate Report 1559 87th Cong. 2nd Sess. (1962)	25
House Report 1918 73rd Cong.	18
House Report 1559 82nd Cong. 2nd Sess. (1962)	25
House Report 1635, 89th Cong., 2nd Sess. (1966)	29

United States Court of Appeals

FOR THE NINTH DISTRICT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

*On Petition for Review of Orders of the
Federal Communications Commission*

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This is a petition for review of memorandum opinions and orders of the Federal Communications Commission, released April 4 and July 14, 1967, ordering petitioner to comply with Section 74.1103(e) of the Commission's Rules,

47 C.F.R. 74.1103(e). The petition for review was filed under Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C., Section 402(a), and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343. The petitioner seeks review of a Commission order (7 F.C.C. 2d 611, R. pp. 110-114), released April 4, 1967, denying a petition for waiver of Section 74.1103(e) of the Commission's Rules, 47 C.F.R., Section 74.1103(e) and, additionally, a denial of a petition for reconsideration (8 F.C.C. 2d 997, R. pp. 140-142), released July 14, 1967.

Section 402(a) of the Communications Act provides that "any proceeding to enjoin, set aside, annul, or suspend any order of the Commission" under the Act shall be in the manner prescribed by the Judicial Review Act. Section 2 of the Judicial Review Act, 28 U.S.C. Section 2342, provides in subsection (1) the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of the Communications Act. The orders complained of here directing petitioner to alter its business are final orders of the Commission within the meaning of Section 402(a).

Section 3 of the Judicial Review Act, 28 U.S.C. Section 2343 provides that venue "it in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." Petitioner herein has a principal office at 216 Norton Building, Seattle, Washington, within this Circuit, and the business conducted by it which is the subject of the Commission's order is located entirely in the State of Washington. Accordingly, jurisdiction and venue are in this Circuit.

STATEMENT OF THE CASE

Before examining the particular facts in this proceeding, it may be well to review briefly the history of CATV and its treatment by the Federal Communications Commission.

1. History of CATV

The Commission has defined a CATV system "as a facility which receives and amplifies the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business of subscribing members of the public for a fee." *First Report and Order*, 38 F.C.C. 683, 684 N. 1 (1965). CATV or, as it is also called, "cable television" was first used in the mountainous regions of Pennsylvania in 1950. The systems there were designed to bring signals to areas unable to receive television because of the mountainous shield. The systems consisted of antennas erected on mountain tops and connecting cable lines to the communities serviced. An installation fee and a monthly service charge were made to recover the cost of antennas, to maintain the distribution system, and also to provide a return on investment.

After this first successful venture, CATV was used to bring television to regions situated beyond the normal range of any television broadcast stations. Since television signals travel in straight lines and do not follow the curvature of the earth, towns more than 70 miles from a station were not generally able to receive television. Again by erection of high television towers, the TV signals could be received in remote regions and carried by coaxial cable into the community. Even greater distance could be covered by the erection of microwave relay stations to re-transmit signals and send them by direct line to receivers in distant communities. Thus, the earliest use of CATV systems was to bring television to people who had none.

The first equipment used transmitted only one television signal. However, this equipment was improved and refined

so that five-channel equipment was soon available, allowing CATV operators to bring all major networks into the remote regions. Additionally, this advance enabled CATV to service cities with one television station by bringing in other network programs. With this added five-channel service, CATV enjoyed a tremendous growth. During the decade of 1956 to 1965, the industry grew in the United States from 400 to more than 1,600 systems. The number of subscribers jumped from 14,000 in 1952 to 2,500,000 subscribers in 1967. Currently about 5 percent of all television reception in the United States is through CATV.

Within the last two years, CATV has taken another dramatic turn. Even in major metropolitan areas which now receive all three major networks, CATV, with its present capacity of bringing 12, 20, and even 40 channels, has established a service market. Two such examples are in New York City and Los Angeles, California. The service by CATV in these cities is somewhat different from the remote areas. First, it offers finer reception by eliminating the interference problem caused by high buildings, electrical spheres, airplanes and other air disturbances. Additionally, color television requires a finer signal than black and white, and CATV provides quality signals.

Still another development in CATV progress has been program origination over the closed cable circuits, designed to serve particular needs and tastes of local communities or elements of these communities.

CATV expansion, in its short history, has been phenomenal. The growth and the breadth of services will also be phenomenal, if it is given equal status and permitted freely to compete with other communications media without unreasonable restriction relegating it to second class status.

CATV, along with telephone, telegraph, radio and television, should be permitted to take its place as an important but independent means of communication.

2. CATV Regulations

Federal regulation of CATV is of recent origin. The first F.C.C. action relating to CATV¹ was in 1956 and concerned the limits of cable radiation of energy by CATV systems. This action was consistent with the Commission's practice of protecting radio and television signals from interruption by electrical interference. In 1959, after a two-year investigation of "auxiliary" services of television broadcasting, the Commission issued a report and order² holding that it did not have jurisdiction under the Communications Act of 1934 to regulate CATV systems.

The Commission stated:

"It is urged that we should regulate CATV's under our 'plenary power' over communications. Some parties have cited to us in this connection various subparagraphs of Section 303 of the act, under which we are empowered to . . . make such rules and regulations . . . as may be necessary to carry out the act (sub-sections (a), (b), (f), (g), (i), (r)).

¹ *In re Incidental and Restricted Radiation Devices, Third Report and Order*, Docket No. 9288, 21 Fed. Reg. 5366, 13 Pike and Fischer R.R. 1546a (1956).

² *In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order*, Docket No. 12443, 26 F.C.C. 403 (1959).

However, we do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications." (26 F.C.C. at 429)

The Commission also rejected as absurd an economic protectionist basis of CATV regulations.

"In essence, the broadcaster's position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any non-broadcast competitive enterprise, . . . as closed-circuit music and news services, closed-circuit theatre television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.*" [Emphasis added.] (26 F.C.C. at 431)

After this disclaimer of jurisdiction over CATV, the Commission requested Congress to pass certain remedial legislation conferring limited jurisdiction over CATV. The proposed legislation contained in S. 2653, 86th Cong. 1st Sess. (1959) was defeated after long and bitter debate by a vote to recommit the bill. A second attempt by the Commission in 1961 to gain jurisdiction over CATV died in committee. A 1966 bill to confer jurisdiction over CATV also failed.³

³ A legislative history of the Commission's unsuccessful attempts to gain jurisdiction is contained in Appendix A, *infra*, p. 1a.

Following these unsuccessful attempts to obtain Congressional grant of jurisdiction, the Commission in a series of proceedings culminating in the *Second Report and Order*, 2 F.C.C.2d 725 (1966), reversed its 1959 ruling and assumed regulatory control over CATV systems under its rule making procedures. The first proceeding in 1962 proposed that the rules relating to microwave relay be amended to require microwave facilities serving CATV systems to insure that the CATV system carry local stations and refrain from duplicating the local station's programming for 30 days.⁴

A year later in 1963, the Commission issued a further notice of proposed rule making⁵ to modify the non-duplication condition to provide for a 15-day program protection and extend the carriage and non-duplication rules to common carrier microwave radio relay stations used to serve CATV systems. The Commission did not hold hearings or oral arguments on its proposals. Six months after the closing of the record in the pending notices, the Commission issued the *First Report and Order*, 38 F.C.C. 683 (1965), requiring microwave-CATV systems, upon request, to carry the signals of all local and nearby television stations and to refrain from duplicating the programs broadcast by such stations, either simultaneously or within 15 days before or after local broadcast. The Commission's adoption of these rules was based on its conclusions that: (1) a CATV system's failure or refusal to carry the signal of a local station and duplication of a local station's programming constitute "unfair competition";

⁴ Notice of Proposed Rule Making in Docket No. 14895 (27 Fed. Reg. 12586 (1962)).

⁵ Notice of Proposed Rule Making in Docket 15233 (28 Fed. Reg. 13789 (1963)).

and (2) action is needed to ameliorate the adverse effects of CATV competition upon the maintenance and healthy growth of television broadcast service (38 F.C.C. at 713). The Commission concluded with this extraordinary statement:

“[W]e think every station affected is entitled to appropriate carriage and non-duplication benefits *irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station,*” [Emphasis added.] (38 F.C.C. at 713)

Upon issuance of the *First Report and Order*, the Commission also issued a *Joint Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 15971, 1 F.C.C.2d 453 (1965), which contained as Appendix B a “Memorandum on its Jurisdiction and Authority”, concluding that the Commission had jurisdiction to regulate *all* CATV systems, irrespective of the use of microwave facilities, and proposing to make the Rules concerning carriage and non-duplication conditions applicable to all CATV systems.

Commissioner Loevinger very forcibly dissented from this assumption of Jurisdiction:

“However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATV’s, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad

discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts, and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific Congressional authority." (1 F.C.C.2d 495 (1965))

After receiving the comments solicited in its Notice of Inquiry, without evidentiary hearing or oral argument and before issuing any further specific rule proposals, the Commission, on February 15, 1966, released a Public Notice G, No. 79927, announcing that it planned to adopt new rules to regulate all CATV systems. The rules were adopted by the Commission on March 4, 1966,⁶ released to the public on March 17, 1966,⁷ and made effective April 17, 1966.

⁶ Public Notice G, No. 80850 (March 8, 1966).

⁷ *Second Report and Order*, Docket Nos. 14895, 15233, 15971, 2 F.C.C.2d 725 (1966).

Two Commissioners dissented from the promulgation of these rules adhering to the prior decision that the Commission had no statutory authority or jurisdiction over CATV, *Second Report and Order*, 2 F.C.C.2d at 808 and 819.

3. CATV in Bellingham, Washington

In 1951 there was no local television station in Bellingham, Washington. In order to meet the need and demand for local television, the Bellingham CATV system was franchised and licensed, and began operation in 1951 (R. p. 33). It has been in continuous, dependable service since that date. In addition to Bellingham, Telecable operates CATV systems in the neighboring Washington communities of Anacortes, Burlington, Mount Vernon and Sedro Woolley. Service began in Anacortes in 1963, in Burlington in 1956, in Mount Vernon in 1963, and in Sedro Woolley in 1956.

The principal service of Telecable is to make possible the reception of television signals from four (4) television stations in Seattle, Washington and one or two stations in Tacoma, Washington⁸ (R. p. 34). Each system is equipped with a 12-channel capacity, and receives the signals of each television station carried without the assistance of microwave relay (R. p. 33).

The Bellingham system also carries local station KVOS-TV, which is classified as a Bellingham, Washington-Vancouver, British Columbia station. KVOS has requested non-duplication

⁸ One Tacoma station is carried in Bellingham and two Tacoma stations are carried in the remaining four communities.

protection on all of Telecable's CATV systems (R. p. 39). KVOs-TV derives an overwhelming portion of its revenues from the Vancouver, British Columbia area, based upon its substantial circulation in that Canadian city, rather than the domestic Bellingham, Washington area (R. p. 4). KVOs, established two years after the Bellingham CATV system, has shown a steady growth in earnings and revenue despite CATV competition.

Petitioner is not a licensee or applicant for license before the F.C.C. Its operations in Bellingham pre-date by fifteen years any F.C.C. regulations pertaining to the conduct of a CATV business, and its operations have never been the subject of any F.C.C. hearings or findings (R. pp. 51, 121-122).

The cultural, economic and commercial interests of the residents of Bellingham and its environs are principally directed south to Seattle as opposed to Canadian cities to the north. In recognition of this fact, and to meet local needs and interests, Telecable has been able to sustain its market by bringing Seattle stations to its serviced communities. In addition, it has conducted extensive community program origination on its CATV systems. With expanded service and programming, the Bellingham CATV system has met with continued local support and growth to its present level of approximately 6,000 subscribers (R. p. 1).

A curtailment of full-time Seattle services maintained for over fifteen years will constitute a disruption in the normal economic interests and development of northern Washington. The non-duplication order will result in the elimination of two channels carrying Seattle stations and will serve to decrease substantially the value of the cable television services rendered by Telecable and an expected decline

in subscription and revenue as a direct result from the diminuation of promised services (R. p. 7).

4. The Proceedings Before the F.C.C.

Petitioner, Total Telecable, Inc., is neither a licensee nor an applicant for a license before the F.C.C. Its business operations under local franchises pre-date the Commission's CATV rules by fifteen years.

On June 17, 1966, two months after the effective date of the new rules, Telecable filed with the Commission a petition for a waiver of Section 74.1103 of the Commission's newly promulgated rules and generally challenging the validity of these rules. By order of April 4, 1967, the Commission, without hearing or findings on the substantial factual issues raised, summarily denied the petition for waiver and, further, issued an order for petitioner to comply with Rule 74.1103(e) within thirty days. (7 F.C.C.2d 611 (1967)). Petition for reconsideration and application for stay were likewise denied. (8 F.C.C.2d 997 (1967)). The entire record of this appeal is contained in the pleadings and orders of the Commission. No evidence was taken, as indeed, no hearing was allowed.

SPECIFICATION OF ERRORS

1. The Commission erred in usurping jurisdiction over CATV, contrary to its controlling statute and in conflict with its prior administrative rulings, recognized by the courts and approved by Congress.

2. The Commission erred in the issuance of the CATV Regulations, restricting and limiting the activities of non-licensees engaged in the reception and distribution of television signals.

3. The Commission erred in promulgating the non-duplication rule, Section 74.1103, and in the issuance of a summary order restricting the reception and distribution of information, as a prior restraint in the exercise of free speech in violation of the First Amendment.

4. The Commission erred in the issuance of a summary order without hearing to a non-licensee, threatening its sixteen-year business, and a taking of property in violation of the Due Process clause of the Fifth Amendment.

5. The Commission erred in failing to provide for an evidentiary hearing as required by the Communications Act and the Administrative Procedure Act.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION LACKS STATUTORY AUTHORITY TO REGULATE PETITIONER'S CATV BUSINESS

A. The Communications Act Does Not Provide For Regulation Of Non-Licensee Community Antenna Television Systems, Engaged In The Reception And Distribution of Television Signals.

An analysis of the Communications Act of 1934 demonstrates that there is no statutory authority for the regulation

and control by the F.C.C. of community antenna systems, which are admittedly not licensees or applicants for licenses before the Commission. The F.C.C. derives its powers and authority from its creating statute, the Communications Act of 1934, as amended, 47 U.S.C. 151 *et. seq.*, and the Act likewise limits and controls the extent of its jurisdiction and power. *Regents of Georgia v. Carroll*, 338 U.S. 586 (1950).

After its repeated disclaimers of jurisdiction over CATV and its unsuccessful attempts to gain a Congressional grant of jurisdiction, the Commission reversed its prior administrative interpretation and assumed jurisdiction over all CATV systems, *Second Report and Order (CATV)*, 2 F.C.C. 2d 725 (1966). Conscious of its turnabout, the Commission took great pains to justify this newly discovered jurisdiction and attached to the *Second Report and Order* Appendix C, entitled "Commission's Memorandum on its Jurisdiction and Authority," 2 F.C.C. 2d at 793-797. This memorandum followed an apologia in the body of the report entitled, "A. Jurisdiction as a Matter of Law," 2 F.C.C. 2d at 728-733, which concluded with the assertion that "even if our past rulings in this troublesome area had been inconsistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous." 2 F.C.C. 2d at 733.

The Jurisdiction Memorandum pieces together a tenuous jurisdictional foundation from Sections 1, 4(i), 303(f), (h), (p), and (r), 307(b), 315, 317, and 508 of the Act, and of these the memorandum states "the crucial sections would appear to be 1, 307(b), 4(i), 303(f), (h), and (r)." 2 F.C.C. 2d at 794. An examination of these provisions and the legislative history of the Act do not support the Commission's conclusion that it has jurisdiction over CATV.

1. Title II (Common Carriers) And Title III (Radio) Of The Communications Act Are Mutually Exclusive, Providing Separate Schemes Of Regulatory Control, Neither Of Which Apply To Reception And Distribution By Cable.

The language of the Communications Act and its legislative history demonstrate that the F.C.C.'s power to regulate "wire communications" is restricted to its common carrier functions under Title II of the Act, 47 U.S.C. 201-222, and that its power to regulate "radio" is restricted to its licensing control under Title III, 47 U.S.C. 301-397. The two titles, born out of different acts and agencies, provide entirely distinct schemes of regulation. Title II, the "Common Carrier" part, regulates tariffs, rates and services of common carrier wire communications. Title III, the radio part, provides for licensing of radio and television stations and the allocation of frequencies and service areas to these stations. The Commission, in its usurpation of jurisdiction over CATV, has borrowed "wire communications" from the definitions applicable to the one service and applied it to the other. Wire communications are unique to common carrier service and have no application to radio. In attempting to place CATV under Title III regulatory powers, the Commission seeks to impose a new scheme of restrictive regulations, other than licensing as provided in Title III. The Act and its legislative history will not support this jurisdictional grab.

By enactment of the Communications Act of 1934, Congress placed under one agency unified control over all forms of electrical communications. The Act transferred to the newly created Federal Communications Commission the functions of the Interstate Commerce Commission regarding common carriers, and the functions of the Federal Radio

Commission regarding radio. The provisions of the I.C.C. Act pertaining to common carrier regulations became Title II of the Communications Act and the provisions of the Radio Act of 1927, 47 U.S.C. 81 *et. seq.*, became Title III of the Act. The Act did not create any new areas of federally regulated activity. Title I created the Commission and sets forth its purposes and definitions which cover its disparate functions contained in Title II and III.

If there is any authority or jurisdiction over CATV, it must come from either Title II or III since the other titles provide no independent substantive authority.⁹ Of these two, Title II has no application, since the Commission has stated that CATV operations do not constitute common carrier activities under the Act. *Philadelphia Television Broadcasting Co. v. F.C.C.*, 359 F 2d 282 (D.C. Cir. 1966).

In attempting to establish its tenuous jurisdiction under Title III, the Commission first relies upon the general purposes and definitions contained in Title I. Section 1, 47 U.S.C. 151, explains that the purposes of the Act are for "regulation of interstate and foreign commerce in communication by wire and radio," and Section 2(a), 47 U.S.C. 152(a), explains that the act applies to "all interstate and foreign communications by wire or radio and . . . transmission of energy by radio." Section 3(a) of the Communications Act, 47 U.S.C. 153(a), defines "wire communication" or "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by either wire, cable or other like connection between the points of origin and reception of such

⁹ Of the remaining three parts to the Act, Title IV pertains to procedural and administrative requirements; Title V, penalties for violations of the Act; and VI, miscellaneous housekeeping provisions.

transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." The Commission argues that CATV, although not a common carrier, is "wire communication," and using the definition in 3(a) as a spring board, claims that it possesses Title III powers of regulation and rule making over CATV, as contained in Sections 4(i), 303(f), 303(h), and 307(b) of the Act. This rationale is false since: (1) Title I conveys no substantive rights but only defines terms used throughout the Act; (2) the definition of "wire communications" pertains only to Title II common carriers; (3) the legislative history indicates disparate functions over common carrier wire communication on the one hand and radio on the other, combined for convenience under one Act and with one set of definitions; and (4) Title III pertains essentially to licensing of radio transmission and not restriction of reception.

The Radio Act of 1927 contained a definition of "radio communication" in Section 31 (47 U.S.C. 111) which is essentially the same as Section 3(b) of the Communications Act. However, the Radio Act of 1927 contained no definition of "communication by wire" similar to Section 3(a) upon which the Commission now relies. Section 3(a) is derived from Section 1(3) of the Interstate Commerce Act (41 Stat. 475) which related only to activities of common carriers. Section 3(a) was incorporated into the Communications Act for the purpose of defining the applicability and impact of Title II powers which the F.C.C. took over from the I.C.C.

Title III conferred upon the F.C.C. the authority which the Federal Radio Commission had with respect to communication by radio and Title II conferred upon the F.C.C. functions which the I.C.C. had with respect to activities of common carriers. No crossover was intended and none was achieved. Moreover, the F.C.C. has never before claimed or

attempted to confuse these distinct functions. Prior to 1934, the Federal Radio Commission could not under the predecessor of Title III of the Communications Act adopt rules and regulations with respect to wire communication and, prior to 1934, the I.C.C. could not exercise Title III powers with respect to persons engaged in common carrier activities. Section 2 is simply a declaration of purpose that the authority of the Commission applies in appropriate cases to communication by wire and in other cases to communication by radio.

The intent of the Communications Act is underscored by its legislative history. The Senate Committee Report (Senate Report No. 781, 73d Congress) accompanying the legislation explains (p. 3) that Title II, for the most part, "follows the provisions of the Interstate Commerce Act now applicable to communications or adopts some provisions of that Act now applicable only to transportation." As to Title III, it states that it (p. 6):

"... consists of the Radio Act of 1927 written to bring into a single title effective provisions of that Act and its several amendments. The language has been changed in minor respects to conform to the terms and definitions in the remainder of the bill."

The Conference Committee, in resolving differences between Senate and House bills, stated as to Title III (Conference Report on Communications Act of 1934, House Report No. 1918, 73d Cong., p. 47):

"The Senate bill abolishes the Federal Radio Commission, and repeals the Radio Act of 1927, but in effect reenacts it in Title III, eliminating certain matters no longer effective, and adding certain provisions, most of which are taken from

H.R. 7716, 72d Congress, which passed both houses but was pocket vetoed. Title III of the House bill abolishes the Federal Radio Commission but transfers its functions under the Radio Act of 1927 to the new Commission. Title III of the substitute adopts the provisions of the Senate bill, except that most of the changes from existing laws which were not contained in H.R. 7716 have been omitted."

When Congress enacted the Communications Act it manifestly intended the F.C.C. to perform under Title II of the Act those functions which were formerly performed by the I.C.C. under its Act and its Title III functions were to be those which had been performed by the Federal Radio Commission under the Radio Act of 1927. Nowhere in the legislative history is it indicated that the F.C.C. granted Title III functions over communication by wire. The Commission's reliance on Section 3(a) for assertion of Title III powers over CATV is therefore without foundation. Had the Congress intended that Title III would apply equally to wire or cable communication, it could have easily manifested such an intent by including these words in Title III, or by amending the definition of "broadcasting" in Section 3(a) to include wire communication. It did not choose to do so and the two parts are mutually exclusive in posing different regulatory schemes to different regulatory problems. CATV is not included in either scheme.

2. Title III Pertains To Radio Transmission, Rather Than Reception And Distribution By Cable, And Establishes A System Of Licensing Regulation.

The method of regulation under Title III of the Act chosen by Congress is *licensing*. The Supreme Court

specifically noted this restriction in *Regents of the University of Georgia v. Carroll*, 338 U. S. 586 (1950):

“As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. . . . [T]hese cases ... make clear that *the Commission’s regulatory powers center around the grant of licenses*. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.” (338 U.S. at 597-99) (Emphasis added.)

In *Southwestern Cable Co. v. United States*, 378 F 2d 118 (9th Cir. 1967), this Court examined the basis for the Commission’s newly asserted jurisdiction over CATV in the issuance of cease and desist orders against CATV operators. The Commission cited as its jurisdictional authority to issue such orders, Sections 4(i) and 303(r) of the Act, 47 U.S.C. 154(i) and 303(r), sections also asserted here as a basis for jurisdiction. After a careful analysis of these sections, Judge Barnes explained that the “method of regulation of *broadcasting* chosen by Congress was licensing.” Since petitioner here, as in *Southwestern*, is a CATV operator, and as such neither a licensee nor applicant for license, petitioner is beyond the ambit of the Commission’s licensing authority and control. The Commission’s attempts to regulate, or more accurately restrict and inhibit, CATV other than by its licensing procedure are invalid. Since CATV systems seek no radio frequencies in their operations and are not before the Commission for license application, modification, or renewal, the Commission is without jurisdiction or authority to regulate them.

The limitation of the Commission's authority to licensing regulation was also recognized by the Supreme Court in *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954), which dealt with the network "giveaway" programs of a few years ago. That case dealt with the Commission's power to license and its relationship between sanctions under the Criminal Code against broadcasting lottery information. (18 U.S.C. 1304)

"Like the Court below, we have no doubt that the Commission concurrently with the Department of Justice, has power to enforce Section 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions. Both the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under Section 1304, the Commission cannot employ the statute to make them so by agency action." (Emphasis added). (347 U.S. at 289-290).

CATV operation is a reception service and not a transmission service. The whole thrust of the Radio Act of 1927 and Title III of the Communications Act of 1934 was to confer on the Federal Radio Commission and the FCC authority over transmission, but not over reception. Section 301 of the Communications Act, 47 U.S.C. 301, defining the scope of Title III of the Communications Act, makes this abundantly clear when it states:

"It is the purpose of this Act, among other things, to maintain the control of the United States over all channels of interstate and foreign *radio transmission*; and to provide for the use of such channels, but not the ownership thereof, by persons

for limited periods of time, under licenses granted by Federal authority. . . ." (Emphasis added.)

In 1927 existing legislation was inadequate to prevent the Secretary of Commerce from denying licenses to qualified applicants merely because interference would be caused to other stations or to permit the Secretary to confine a licensee to the frequency originally assigned. *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-13 (1943). The inevitable result was chaos in the spectrum. The Radio Act of 1927 was passed to relieve this chaos by creating adequate authority over radio transmission. This is the authority which was granted to the Federal Radio Commission by the Radio Act of 1927 and this was the authority which Title III of the Communications Act gave to the FCC.

There is nothing in any of the specific statutory provisions cited by the Commission as the basis for its authority which indicates that the Commission's Title III authority extended to anything but regulation of transmission. Sections 4(i) and 303(r) give the Commission broad rule making authority to carry out the provisions of the Act. But by themselves they confer no independent power; they are dependent upon other substantive provisions.

Section 303(f) authorizes the Commission to promulgate rules and regulations designed to prevent interference among stations. This section clearly relates to transmission alone. There is nothing whatsoever in the activities of CATV that directly or indirectly causes any interference among stations and the CATV rules do not relate to transmission interference. Section 303(h) authorizes the Commission to establish areas or zones to be served by stations. Again, the subject matter is clearly transmission.

The last "crucial" section relied upon by the Commission is Section 307(b). This section provides:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

By its terms this section is limited to transmission and its method of regulation is by license, whether it be applications for licenses, modifications, or renewals. Section 307(b) provides that when conflicting demands exist for frequencies, the Commission is to make an equitable allocation.

The legislative history of Title III confirms the Congressional purpose in conferring power only over transmission. These sections came to Title III from the Radio Act of 1927. In the debate on the House floor on H.R. 9971, (a later version of H.R. 5589), Congressman White of Maine, who introduced both H. R. 5589 and H. R. 9971, cast further light on Congressional purpose (67 Cong. Rec. 5479):

"Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas.
* * * Stations so centered detract from the value of each other and interfere with the highest quality of service. In the bill before you the Secretary is given authority in passing upon a license to consider its proposed location and the area to be served thereby, and he is enjoined to effect an equitable

geographic distribution of stations over the entire country.”

Both as a matter of construction of the words of the statute and a study of the legislative history, Congress intended to restrict Commission authority under Title III to regulation of transmission, not reception.

In the recent opinion of the United States Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Co. v. FCC*, ___ F. 2d ___ (District of Columbia Circuit No. 20274, decided June 30, 1967) the court, apparently troubled by the Commission’s assertion that its regulatory scheme would suffer by unregulated CATV, essentially relied on Section 307(b) to *extend* the Commission’s statutory jurisdiction to cover CATV systems. “[*Carroll*] does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the regulatory scheme.” *Buckeye, supra*, at 7. The court disregarded the *Carroll* holding and failed to analyze or discuss the significant statutory and constitutional questions raised by the Commission’s action. Since the question is not what the Commission’s authority *should* be but what it *is* under the statutory *licensing* approach taken by the Congress, the *Buckeye* holding (which related only to the application of Section 74.1107 of the Rules) is in error and should not be followed by this Court.

The inconsistency of the Commission’s present position and the over-reaching nature of its CATV jurisdictional grab is perhaps best illustrated by its conduct in 1962 in connection with the All-Channel Receiver Law. In 1962, the Commission sought and received Congressional legislation designed to allow the Commission to require UHF reception capability for all commercial television receivers. (47 U.S.C. 303(s), 330

(1962), H. Rep. No. 1559, S. Rep. No. 1525, 87th Cong., 2d Sess. (1962).)

The Commission recognized that its authority over reception devices was inadequate, and in requesting the All-Channel Receiver Law, it candidly stated to the Congress (Hearings on H.R. 8031 before the House Committee on Interstate and Foreign Commerce, 87th Cong., pp. 7-8 (1962)):

“In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities”

The Congress obviously agreed with the Commission as to lack of authority over reception for it proceeded to enact the All-Channel Receiver Law, which added to the Communications Act the only reference or application to radio reception.

There would appear to be no clear or significant distinction between such limitation on the use of individual *receiving* sets and the present attempted foreclosure or limitation on the use of various CATV receiving apparatus, the former of which the Commission felt in 1962 required an amendment to the act since its “present authority” “was not commensurate with its responsibilities”.

The Commission was obviously right in 1962 in asking Congress for a specific grant of authority to deal with the

subject of reception. Its claim now under Title III of the Communications Act to deal with the subject of CATV is an outright usurpation of authority.

B. An Administrative Ruling Recognized by the Courts and Acquiesced to by Congress Has the Force of Law and Cannot be Overturned by the Agency

It is a well settled principle of statutory construction that a prior and consistent administrative interpretation is given great weight by the courts, *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-315 (1933). Even greater weight is given to the administrative interpretation when Congress becomes aware and acquiesces to the construction of the statute as interpreted by the administrative agency. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396-397 (1956), affirming the decision of this Court, 218 F. 2d 91 (9th Cir. 1954).

The conclusiveness of the original administrative interpretation is strengthened where the question is the scope and power of the agency to issue legislative rules, *United States v. American Trucking Association*, 310 U.S. 534, 549 (1940). It is likewise strengthened where the courts have recognized the prior administrative interpretation, *Corn Products Refining Co. v. Commissioner of Internal Revenue*, 350 U.S. 46, 53 (1955); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). But where the Congress is deemed to have approved the longstanding administrative interpretation by not amending or by re-enactment of the statute, the interpretation has the force and effect of law. *Helvering v. Winmill*, 305 U.S. 79, 83 (1938), cited with approval in *Fribourg Navigation Co. v. Commissioner of Internal Revenue*, 383 U.S. 272 at 283-284 (1966); *J. G. Boswell Company v. Commissioner of Internal Revenue*, 302 F. 2d 682, 685 (9th Cir. 1962) cert.

denied 371 U.S. 860 (1962).

CATV operation began in the early 1950s. The first FCC action relating to CATV was in 1956 and concerned the limits of cable radiation of energy by CATV systems. *In re Incidental and Restricted Radiation Devices, Third Report and Order*, Docket No. 9288, 21 Fed. Reg. 5366, 13 Pike and Fischer R.R. 156a (1956). In 1959, after a two-year investigation of "auxiliary" services of television broadcasting, the Commission issued a report and order absolutely disclaiming any jurisdiction over CATV under the Communications Act of 1934, *In re Notice of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order*, Docket No. 12443, 26 F.C.C. 403 (1959). The Commission's exhaustive examination of jurisdiction concluded that it did not have plenary power to regulate CATV under the Communications Act.

Since 1958, the FCC had frequently and consistently held that it did not have regulatory jurisdiction over the operation of community antenna television systems.¹⁰ *Frontier Broadcasting Co. v. Collier*, 24 FCC 251, 16 Pike and Fischer R.R. 1005 (1958); *CATV and TV Repeater Services*, 26 FCC 403, 18 Pike and Fischer R.R. 1573 (1959); *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike and Fischer R.R. 184 (1962). This determination of a want of jurisdiction was based principally upon recognition of the distinguishing fact that the community television master-antenna activity is a *reception* function utilizing closed circuit wirelines, as opposed to a jurisdictional broadcasting or "radio" activity, and thus fell without the scope of the Communications Act.

¹⁰ For a legislative history of the Commission's unsuccessful attempts to get a jurisdiction grant from the Congress over CATV see Appendix A, *infra*, p. 1a.

The Commission's administrative interpretation that it lacked jurisdiction over CATV systems was judicially noticed in *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho, 1962), reversed on other grounds, 335 F. 2d 348 (9th Cir. 1964). The court stated:

" As indicated in this Court's previous discussion of history of this so-called consent provision, community antenna services are not 'broadcasters' within the meaning of the definition of 'broadcasting' as presently stated in the Federal Communications Act. (FCA, 47 USC 153(a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services

So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does not have jurisdiction over community antenna services." (211 F. Supp. at 55.)

The FCC, acknowledging its lack of jurisdiction, formally determined, however, that legislation conferring it with certain limited authority over community antennas would be advisable; and, accordingly, the agency's want of jurisdiction was first brought to the attention of the 86th Congress along with certain legislative recommendations of the Commission, 105 Cong. Rec. 6753 (1959).

Lengthy hearings through the summer and fall of 1959 were held by a subcommittee of the Senate Committee on Interstate and Foreign Commerce on the legislation proposed by the FCC. *Hearings before the Communications Sub-Committee of the Committee on Interstate and Foreign Commerce, United States Senate, 86th Cong. 1st Sess. (1959), of VHF*

Booster and Community Antenna Legislation. The full Senate Interstate and Foreign Commerce Committee then favorably reported a bill granting the Commission jurisdiction to regulate community antenna systems in certain particularized circumstances, S. Rep. No. 923, 86th Cong., 1st Sess. (1959) accompanying Senate Bill 2653 entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over community antenna systems." In 1960, after several days of debate, the Senate recommitted the bill and no legislation authorizing FCC regulation of community antenna systems was enacted by the 86th Congress. 106 Cong. Rec. 10520, 10547 (1960).¹¹ Again, in 1961, the FCC submitted to the 87th Congress proposed legislation giving it jurisdiction to regulate community antenna systems. 107 Cong. Rec. 2523 (1961); S. 1044 and H.R. 6864, 87th Cong., 1st Sess. (1961). The 87th Congress similarly failed to enact any legislation conferring the Commission with jurisdiction over the community antenna industry.

Following these unsuccessful attempts to attain Congressional grant of jurisdiction, the Commission in a series of proceedings culminating in the *Second Report and Order*, 2 FCC 2nd 725 (1966) reversed its prior rulings and assumed regulatory control over CATV systems under its rule-making procedures. Thus, the Commission upset and reversed its prior holdings that it had no jurisdiction over CATV, which was then in its fifteenth year of operational history.

Perhaps uncertain of this bold usurpation of jurisdiction, the Commission again appealed to Congress for statutory authority conferring jurisdiction upon it over CATV systems, House Report 1635, 89th Congress, 2nd Sess., submitted June 17, 1966 to accompany H.R. 13286. This bill failed to pass the Congress as did the prior attempts. No doubt

¹¹ Appendix A, *infra*, pp. 1a-16a.

persuasive in this decision was the very strong minority report which stated:

“H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time was served to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; . . . it would create an entirely new concept of regulation at federal level; it would violate the Constitutional guarantees of the First Amendment; it would permit a federal administrative agency (supposedly an arm of Congress, created by the Congress) to write substantive law by the exercise of rule-making powers; . . .”¹²

By its assumption of jurisdiction, the Federal Communications Commission has erroneously attempted to reverse its prior decisions which, by court recognition and Congressional approval, had assumed the force and effect of law.

The Supreme Court has rarely departed from its doctrine of longstanding administrative interpretation. In *Baltimore and Ohio Railway Company v. Jackson*, 353 U.S. 325, 330-331 (1957), the question was whether or not the administrative agency did in fact decide the matter. By a five to four decision, the Court held that there had been no express administrative determination of the problem. “We believe petitioner overspeaks in elevating negative action to positive

¹² For a fuller statement see Appendix A, *infra*, pp. 27a-34a.

administrative decision.” Here, there can be no doubt that the FCC made a definitive ruling that it lacked jurisdiction over CATV.

Other attempts to depart from this doctrine have been based upon the argument that the Congress did not clearly acquiesce or approve the administrative ruling. In *Cammarano v. United States*, 358 U.S. 498, 510-511 (1959) the Court stated that it was not considering “a case where no reliable inference as to Congress’ intent can be drawn from reenactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of its reenactment.” Here too, the FCC when it presented to Congress a proposed amendment which was rejected, there had been no prior conflicts in its own decisions nor any contrary interpretations by the courts.¹³

In *Fribourg Navigation Co. v. Commissioner of Internal Revenue*, 383 U.S. 272, 283-284 (1966), the Supreme Court rejected the argument that there was no approval since Congress had failed to focus on the issue. The Court explained: “The legislative history in this area makes it abundantly clear that Congress was cognizant of the revenue possibilities in sales above depreciated cost.” Here too, there can be no doubt from the legislative history, the debate, and even the title of the bill — “a bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over community antenna systems” — that Congress did focus on the issue in rejecting the proposed amendment.

¹³ Since defeat of the jurisdictional amendment in the Congress, the D. C. Circuit handed down its sweeping decision in *Buckeye Cablevision Co. v. FCC*, ____ F. 2d ____ (D.C. Circuit, No. 20,274, decided June 30, 1967.

The issue here involved is a very important one involving the statutory jurisdiction of a regulatory body created by Congress and performing rule-making functions designated to it by the Congress. Its jurisdiction and purposes are set out in its controlling statute with great specificity. It has usurped jurisdiction, which it consistently and definitively held it did not possess, and which the Congress repeatedly failed to grant after a number of attempts. The Commission's prior administrative interpretation that it did not possess jurisdiction, recognized by the courts and acquiesced to and approved by the Congress in its consideration of the proposal to amend the Act by conferring jurisdiction, has the force and effect of law and cannot be overturned by a subsequent ruling by the Commission. The only way in which the Commission can gain jurisdiction in this area is by a clear delegation of that jurisdiction from the Congress in an amendment to the act, which the Congress in its wisdom has heretofore not seen fit to do. Neither the Commission nor the courts can confer this jurisdiction and change the prior administrative interpretation which has acquired the force and effect of law.

II.

THE COMMISSION'S CATV RULES ARE IN VIOLATION OF THE FIRST AND FIFTH AMENDMENTS OF THE CONSTITUTION

A. The Non-Duplication Rule Restricting the Reception and Distribution of Television Signals is in Violation of the First Amendment

The Commission's non-duplication rule, Section 74.1103, and its summary order against petitioner are a prior restraint in the reception and distribution of information and tread upon free speech guarantees of the First Amendment. The

non-duplication rule provides in part that the CATV system, upon request of the local television station, will black-out same-day imported signals which duplicate local signals.

“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . .” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Communication by any lawful means—motion picture, radio, television, newspaper, closed-circuit, hand-bill, the mails, etc.—falls within the constitutional protections provided by the First Amendment. *ABC v. United States*, 110 F. Supp. 374 (SDNY, 1953), *aff’d sub nom. FCC v. ABC*, 347 U.S. 284 (1954); *Weaver v. Jordan*, 64 Cal. 2d 235, 411 P. 2d 289 (1966), *cert. denied*, 385 U.S. 844 (1966).

The entire stream of communications from source to destination is constitutionally protected. This fundamental constitutional principle embraces not only the right of publication but also the rights of dissemination and distribution, as well as of reception. *Saia v. New York*, 334 U.S. 558 (1948); *Winters v. New York*, 333 U.S. 507 (1948); *Martin v. Struthers*, 319 U.S. 141 (1943). Circulation is equally protected. “Liberty of circulating is as essential to that freedom [freedom of press and speech] as liberty of publishing; indeed, without the circulation, the publication would be of little value.” *Ex Parte Jackson*, 96 U.S. 727, 733 (1877); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Once established that the communication or medium is constitutionally protected, the government shall impose no prior restraints or condition upon the free exercise of a benefit or privilege if the effect thereof is to “inhibit or deter the exercise of First Amendment freedoms”. *Sherbert v. Verner*, 374 U.S. 398, 404-5 (1963); and see *LaMont v. Postmaster*

General, 381 U.S. 301 (1965).

The primary purpose of the First Amendment, as it relates to speech and press, is to suppress prior restraints upon publication, circulation or distribution. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). With "respect to the vital importance of protecting this essential liberty from every sort of infringement" (*Lovell v. City of Griffin*, *supra*, at p. 452), see *Near v. Minnesota*, 238 U.S. 697; *Grossjean v. American Press Company*, 297 U.S. 233; *DeJonge v. Oregon*, 299 U.S. 353. "Freedoms [guaranteed by the First Amendment] . . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Particularly objectionable is the practice of censorship exercised through the vehicle of licensing authority. "The struggle for the freedom of the press was primarily directly against the power of the licensor." *Lovell v. City of Griffin*, *supra*, at p. 451. See also the Chief Justice's dissent in *Times Film Corporation v. Chicago*, 365 U.S. 43 (1961). Indeed, any "intimidation" by the government upon *distribution* of constitutionally protected material, no matter what the purpose, is hostile to the mandate contained in the First Amendment and must be terminated forthwith. *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

In the field of radio and television communications the only permissible restraint has been related to the physical limitation of available frequencies in the spectrum. In *NBC v. United States*, 319 U.S. 190 (1943), the Supreme Court held that because of limitation of available frequencies reasonable regulation under the licensing standard of public convenience and necessity is neither a violation of the First Amendment nor is it censorship within the meaning of Section 326 of the Communications Act, 47 U.S.C. 326. In another radio licensing

case, *Lafayette Radio Electronics Corp. v. FCC*, 345 F. 2d 278 (2d Cir., 1965), the court there upheld the Commission's restrictions on the permissible nature of radio transmissions using the Citizen's Band Radio Service because of natural limitations in available frequencies.

Carter Mountain Transmission Corp. v. FCC, 321 F. 2d 359 (D.C. Cir., 1963), *cert. denied*, 375 U.S. 951 (1963), upheld denial of a radio license to a common carrier which wished to transmit TV signals to a CATV system. The court there side-stepped the First Amendment question and held that this was a "licensing" procedure and not regulation of CATV. Moreover, the court pointed out that the CATV system was not a party to the case and neither its rights nor those of its subscribers were before the court. See also *Idaho Microwave, Inc. v. FCC*, 352 F. 2d 729 (D.C. Cir., 1965) where the CATV system was before the court as intervenor in the licensing of radio microwave transmission to a CATV system. There the court met First Amendment objections by explaining that it was concerned with "licensing" of microwave radio and not regulation of CATV or its right to receive and distribute.

These cases all involved the administrative function of licensing and all predate the *Second Report and Order* which is specifically designed to regulate CATV's right to receive and distribute. Constitutional issues were raised before the Commission in the promulgation of the CATV rules and ignored in the majority ruling, *Second Report and Order*, 2 F.C.C. 2d 725 at 729-734 and 793-797. In the CATV Rules no licensing is involved, and no reasonable regulation over limited frequency space is involved.

"Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications." *Farmer's Union v. WDAY*, 360 U.S. 525, 529 (1958). Section 326 of the

Communications Act (47 U.S.C. 326), which *limits* the jurisdiction and authority of the administrative agency, reads in full as follows:

“Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”

Without equivocation therefore the Congress has prescribed that the FCC shall promulgate no regulation or *condition* which may be understood, construed or used to infringe upon or interfere with the right of free speech, nor shall the Commission be empowered to take any action constituting censorship over radio communications or over “*signals transmitted by any radio station*”.

Here the Commission is repressing maximum distribution of communications made possible by technical advances. Petitioner has sought to demonstrate that its operation and distribution are not harmful to local television. Under these circumstances there is no reasonable protection of the public interest which warrants a restriction on petitioner's First Amendment rights to freely distribute available television signals. Accordingly, the Commission's non-duplication rule and its proscriptive order halting a substantial part of petitioner's distribution without reference to any reasonable public interest is an unlawful restriction of the freedom of speech and in violation of the First Amendment.

B. The Issuance of a Summary Order by an Administrative Agency Threatening Property Rights is a Denial of Due Process in Violation of the Fifth Amendment

The denial of a hearing in the issuance of a proscriptive order halting a substantial part of petitioner's business is a deprivation of property without due process of law in violation of the Fifth Amendment. The due process concept was explained in *Hannah v. Larche*, 363 U.S. 420 at 442 (1960):

“ ‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.”

In *CAB v. Delta Air Lines*, 367 U.S. 316, 330 (1961) the Supreme Court reversed a Board decision modifying a certificate of convenience without hearing. The Court based its decision on the statutory language of the act, but suggested that the condemned action had due process implications, citing *Seatrain Lines v. United States*, 64 F. Supp. 156 at 161 (D. Dela. 1946), affirmed 329 U.S. 424 (1947). *Seatrain* held that the I.C.C. could not alter or cancel an original certificate given to a water carrier. The lower court had held the Commission's order would deprive *Seatrain* of property without due process of law in violation of the Fifth Amendment, 64 F. Supp. 156 at 161. In affirming, the Supreme Court noted that *Seatrain* had been conferred “grandfather” rights, as here, and in reliance had expended large sums in its business, which the order would have threatened.

In *Superior Oil Company v. F.P.C.*, 322 F.2d 601 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964), this Court examined due process issues concerning a denial of hearing in an administrative proceeding. The Court observed that in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) the due process issue was not raised, but that due process required governmental agencies in adjudications to observe the traditional judicial processes, citing *Hannah v. Larche*, 363 U.S. 420 at 442 (1960).

More recently in *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir. 1967), Judge Ely in the concurring opinion reasoned that the petitioner had relied upon the Commission's previous disavowal of jurisdiction over CATV in investing substantial sums of money. The Commission's proscriptive order, if enforced, would adversely affect, if not destroy, the petitioner's investments. In light of this, Judge Ely stated that "the Commission trespassed upon constitutional safeguards against the confiscation of property."

Here, the Commission's order is not merely a freeze or a maintenance of the *status quo* as it was in *Southwestern*, but it means a substantial cutting back of petitioner's existing business. Clearly, this is a taking of property without compensation and without due process of law in violation of the Fifth Amendment.

Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. Cir. 1949) held that a regulatory agency could not create a special class of irregular carrier by granting "letters of registration" with the right to revoke it at any time rather than a certificate of public convenience, in an attempt to circumvent a hearing on revocation or alteration of rights.

The Court explained:

“The controlling practicality, in our view, is that the suspension would destroy property, not a license property but investment and business property. The Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit.” (177 F.2d at 20.)

Here the same device has been employed against the petitioner and other CATV operators. The Commission has assumed special regulatory control over CATV business, and altering and threatening by proscriptive order petitioner’s business without permitting the elementary safeguards of due process as provided by the Fifth Amendment.

Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), dealt with due process aspects in summary suspension of the privilege of contracting with the government. In reversing the agency’s action, the court explained that there was no right to contract with the government, but that the suspension of the privilege involved severe *economic injury*. Such circumstances called for application of basic principles of fairness and *due process*. In applying these principles, the court offered these guidelines: How was the individual to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?

Here, the Commission in its summary action and conclusionary findings in support of its proscriptive order, has demonstrated a callous disregard of fair play and due process. In its denial of hearing it has barred consideration of the harm likely to be suffered. It has stuck steadfastly to its general conclusions favoring television by eliminating competition,

whether or not the competition has any decided impact on the preferred television, and it has ignored the factor of fair play in the issuance of its summary action. Previous application for stay pending reconsideration was summarily denied by the Commission. (R. p. 139) 8 F.C.C. 2d 388. The Commission action has trod upon the property and investments of petitioner's sixteen-year business, most of which was incurred in the period the Commission steadfastly maintained it had no jurisdiction over petitioner's CATV system. Now the Commission will not even listen to petitioner's grievances as it operates to curtail and threaten petitioner's business. Such rules and action are in violation of due process guarantees of the Fifth Amendment.

III.

FAILURE TO PROVIDE FOR AN EVIDENTIARY HEARING IN MODIFYING PETITIONER'S BUSINESS IS IN VIOLATION OF PERTINENT STATUTES AND REGULATIONS

The Federal Communications Commission does not purport to license CATV, but it assumes a greater restrictive and discriminatory control over CATV than exercised over any other communications medium. After its original disclaimer of jurisdiction in 1959 and its failure to gain Congressional grant of jurisdiction over CATV in 1959 and again in 1961, the Commission assumed jurisdiction over CATV in 1966 insofar as CATV affects local television. These rules are admittedly protective of the preferred television broadcast station, restrictive of free competition, and deny minimum safeguards of a fair hearing as required by the Administrative Procedure Act, the Communications Act of 1934, and the Commission's own rules for licensing, and as guaranteed

to all other communications media over which the Commission exercises regulatory control.

A. Existing Statutes and Regulations Require a Hearing Prior to Modification or Revocation of an Existing Business

The conduct and requirements for adjudication and rule making by government agencies are subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* The Act provides that "adjudication" shall be determined on the record after opportunity for agency hearing (5 U.S.C. 554). General conduct and procedure of the hearing, including an impartial hearing examiner, the submission of evidence, right to subpoena witnesses, presentation of documentary evidence, transcript of record, preparation of findings and decisions, are set forth in Sections 7 and 8 of the APA, 5 U.S.C. 556 and 557.

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, contains similar safeguards for administrative hearings affecting the rights of parties. Initially the Act provides for a full evidentiary hearing upon any application for license where there exists a substantial and material issue of fact, 47 U.S.C. 309(e). Concerning the rights of existing licensees, the Act specifies that the Commission in suspending a license, shall conduct a full administrative hearing, 47 U.S.C. 303(m)(2). Before revoking a license or permit, the Commission must serve a show cause order and allow a party a full hearing, where the burden of proof is upon the Commission, 47 U.S.C. 312(c) and (d). Moreover, even a modification of license or construction permit entitles a party to full evidentiary hearing with the burden of proof placed upon the Commission, 47 U.S.C. 316. See *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316 (1961), concerning a

modification of a certificate of convenience in violation of Section 401(g) of the Federal Aviation Act of 1958, 49 U.S.C. 1371(g).

In implementing the Communications Act and the requirements of the Administrative Procedure Act, the Commission's rules similarly provide for hearing: on the suspension of an operator license, 47 C.F.R. 1.85; on the modification of a radio license, 47 C.F.R. 1.87; and on revocation or in cease and desist proceedings, 47 C.F.R. 1.91. Without such minimum and traditional safeguards, individuals have no protection against arbitrary, capricious, or erroneous rulings and orders by quasi-judicial and administrative agencies.

Turning to the rules of conduct and operation pertaining to CATV, the Commission has initially drafted its regulations on the premise that there is a presumption or taint that CATV operation is "unfair" and adverse to the "public interest". *First Report and Order*, 38 F.C.C. 713.

Upon issuance of the Rules in March of 1966, CATV systems existing prior to February 16, 1966 were conferred "grandfather" rights, 47 C.F.R. 74.1107(d). However, they are still subject to a number of restrictive provisions. The Rule at issue here, Section 74.1103, requires all CATV systems to carry local television station signals and, upon the request of the local station, black-out signals that duplicate local programs, Section 74.1103(e). The rules permit a petition for waiver, Section 74.1109, but in acting on waiver petitions the Commission may summarily grant or deny the petition or specify other procedures, including oral argument or full evidentiary hearing, Section 74.1109(f). In short, under its new CATV rules, the Commission may treat the existing CATV system and its petition for waiver in any manner it chooses and subject it to any procedure it may

arbitrarily select under the amorphous umbrella of "consistent with the public interest." Since it appears before the Commission with the taint that its operations are adverse to the public interest, the CATV system must overcome this presumption before gaining the relief sought. Thus far the Commission has shown little inclination to listen to the individual CATV waiver petition and why its general rules do not apply in the particular circumstance.

Although the Commission did not initially license or otherwise authorize the existing operation of petitioner's CATV service, the Commission now seeks to exercise complete licensing authority over petitioner's business, while relegating it to "second class" business status. Without any statutory licensing standard for reasonable protection of market allocation of CATV, the Commission, by its new rules has created a special class of licensee. It has effectively placed CATV operators under its vast powers and authority in dictating which, if any, services can continue to be furnished over cable facilities, yet at the same time, denying the traditional safeguards and protections guaranteed to all licensees.

The practice of creating a special class over which the administrative body seeks greater regulatory control was condemned in *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. Cir. 1949). In that instance, the C.A.B. granted "letters of registration" to a special class of irregular carriers with the right to suspend or revoke them at any time, instead of issuing the usual certificate of public convenience. The court overruled the Board action on the ground that it could not create a special class in order to circumvent the right to evidentiary hearing of the revocation of a license.

The same device is employed here where the Commission "confers" grandfather rights over an existing industry where previously it had held it had no jurisdiction; then attaches to it a tainted business category of unfair competition; and proceeds by its special regulatory edicts to destroy large portions of the industry—while denying any hearings or minimum safeguards allowed to all licensees and the favored groups protected by its new rules. See also this Court's opinion in *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir. 1967) discussed *infra*, which held that the Commission's power to make rules was limited to its "licensing authority."

The new CATV Rules are in startling conflict with the requirements of the Administrative Procedure Act, the Communications Act, and the Commission's own rules in other areas of direct control and regulation. The CATV operations and the application of the new rules fall squarely within the problems and procedures outlined in the Administrative Procedure Act. The Commission's order in the instant case represents "final disposition"¹⁴ and affirmatively orders compliance as contained in 5 U.S.C. 551(6) and formulation of this order is an "adjudication" as defined in 5 U.S.C. 551(7).¹⁵ Pursuant to 5 U.S.C. 554, petitioner is entitled to a full hearing.

The provisions of Section 9 of the Administrative Procedure Act, 5 U.S.C. 558, protect licensees of agencies against

¹⁴ " '[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." (5 U.S.C. 551(6)).

¹⁵ "[A]djudication" means agency process for the formulation of an order." (5 U.S.C. 551(7)).

any “withdrawal, suspension, revocation, or annulment of any license” without a full evidentiary hearing. And Section 2(e) of the Administrative Procedure Act, 5 U.S.C. 551(8), defines “license”, among other things, to include any “form of permission.”¹⁶

Notwithstanding the statutory and regulatory requirements, as a matter of elementary fairness, it would seem that the Commission should give, at minimum, the same protections and safeguards to the CATV industry, over which it assumes inferential control, as it allows to the broadcasting industry, over which it has direct statutory licensing control.

B. A Waiver Petition Containing Substantial and Material Issues of Fact Requires an Evidentiary Hearing

Section 309 of the Communications Act of 1934, 47 U.S.C. 309, provides for certain standards in granting of applications for licenses. The initial standard by which all applications are to be judged is a finding by the Commission of whether a public interest, convenience, and necessity will be served by the grantings of such applications. Subsection (e) of 309 provides that when a “substantial and material question of fact is presented” or the Commission for any reason is unable to make the finding of public interest, the Commission shall formally designate the application for hearing in which all interested parties may participate. See

¹⁶ “[L]icense’ includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” (5 U.S.C. 551(8)) “‘Licensing’ includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.” (5 U.S.C. 551(9)).

Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945); *Folkways Broadcasting Co. v. F.C.C.*, 375 F.2d 299 (D.C. Cir. 1967). The same reasons which require the Commission to examine substantial and material issues of fact in determining the public interest for the grant of licenses, also require an examination of substantial and material issues of fact in a waiver petition.

Petitioner's verified petition for waiver of Section 74.1103 of the Commission's rules¹⁷ contains substantial and material factual issues warranting a hearing. Although the Commission recognized the substantiality of the allegations of fact, and summarized them in its findings, it summarily dismissed the petition for waiver without a hearing on the ground that the allegations were not adequately supported.

In paragraph 2 of its Memorandum Opinion and Order of April 4, 1967, the Commission summarized the pertinent and substantial factual allegations. The summary included the allegations that (1) the interested local station, dependent upon revenue from a distant Canadian audience and advertising market, experienced no adverse economic impact from the CATV system; (2) the exclusivity requirement would virtually eliminate two Seattle stations from the systems, thereby disrupting service and the natural consequences of lost business from a diminution in promised service; and (3) through its

¹⁷ Under the Commission's rule of practice, 47 C.F.R. 1.52, the attorney's signature "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." The waiver petition was not only signed by petitioner's attorney, but contained also a sworn affidavit of verification by the officer of petitioner most familiar with the facts and circumstances of the case.

local program origination of news and civic events the CATV systems better served the local public interest than did the local television station directed at a more lucrative, distant Canadian market. (R. pp. 110-111; 7 F.C.C. 2d at 611-612).

Without examination, the Commission summarily disposed of these issues in paragraph 4 by referring to its *Second Report and Order* and the factual conclusions made there that CATV threatens local television and that CATV is not adversely affected by the obligation of providing same-day program exclusivity. As to local program origination and which medium in fact best represents the local public interest, the Commission held this issue to be irrelevant to the exclusivity requirement.

Thus, the Commission has demonstrated that although it had provided for waiver of the rules and an evidentiary hearing in Section 74.1109, it did not intend in any case, to vary from its factual, as well as legal, preconceptions contained in the *Second Report and Order*. Any attempts to show that these factual preconceptions did not conform to local conditions would not be tolerated. The entire basis for the exclusivity rules, the Commission explained, was the adverse impact that CATV might have on the growth of local television and the splintering or fractionalizing of its audience. Yet in paragraph 4, the Commission callously, if candidly, states that it is not concerned whether there is in fact an adverse economic effect on the local television.

In paragraph 4 of its original order, the Commission concluded that same-day exclusivity would not unduly interrupt CATV service. Again, the Commission demonstrates that it will not be persuaded or even hear evidence which varies from its factual premise in formulating the *Second Report and Order*. What may be true as a general principle, does not fit the particular circumstances here. This would seem to be the

very reason for the formulation of the waiver provisions. Yet the Commission will not recognize exceptions. Under such practice, the waiver provisions are idle and meaningless and designed only to fit existing legal precedents.

Interstate Broadcasting Company v. F.C.C., 323 F.2d 797 (D.C. Cir. 1963) reversed the Commission's action in denying an application for license without a hearing. The court held that, although under the "Storer doctrine" an applicant is not absolutely entitled to a hearing, in rejecting a hearing the Commission must make definite findings and adequately explain its conclusions and support them with specific findings of fact. The D.C. Circuit cited its earlier opinions in *Television Corp. of Mich., Inc. v. F.C.C.*, 294 F.2d 730, 733 (D.C. Cir. 1961), where the court found a bare assertion by the Commission that its action was "clearly in the public interest," an inadequate explanation to support its order; and *Telan-serphone, Inc. v. Federal Communications Com'n*, 231 F.2d 732, 735 (D.C. Cir. 1956), which reversed a Commission order because the conclusions were not adequately supported by a record for review. See also *American Trucking Association v. F.C.C.*, 377 F.2d 121 at 134 (D.C. Cir. 1967), *cert. denied*, 386 U.S. 943 (1967). The only substantial finding made by the Commission in this action is contained in paragraph 5 of its Order. "The requested waivers . . . would not be consistent with the public interest." The conclusion lacks adequate factual support.

In *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316 (1961), the Supreme Court stressed that financial impact on an existing business was a critical issue for careful examination through a full evidentiary hearing. Similarly, *Folksways Broadcasting Co. v. F.C.C.*, 375 F.2d 299 (D.C. Cir. 1967), in reversing the denial of a hearing on a television application, held that economic impact and possible destruction of an

existing station by a grant of a license required the Commission to conduct a hearing under 47 U.S.C. 309. Here also economic impact is a principal issue and again the Commission has improperly refused to allow a hearing.

In *Buckeye Cablevision, Inc. v. F.C.C.*, ___ F.2d ___ (District of Columbia Circuit, No. 20,274, decided June 30, 1967) where the Commission sought to compel a hearing against a CATV system in a cease and desist proceeding, the government explained that it did not intend to enforce the CATV rules where there was no particular need. It successfully persuaded the court that it planned to make an "*ad hoc*", "case-by-case" examination, because the adverse economic impact of CATV on local television was "not yet clear enough for the application of fixed prohibitions." On this earnest assertion by the Commission, the court was persuaded that "the rules are not a flat bar against distant-signal importation" and that the rules may only be temporarily imposed and removed on a showing that they will not adversely affect local broadcasting. The careful case-by-case review promised in *Buckeye* has not been forthcoming here for the Commission stoutly refuses to make any particular examination of the existing factual circumstances of petitioner's CATV systems *vis-a-vis* the local television station.

**C. The Issuance of a Proscriptive Order
Against a Non-Licensee Without Hearing
Is in Violation of Section 312 of the
Communications Act**

In its memorandum opinion and order, released April 4, 1967, the Commission denied without hearing petitioner's application for a waiver of the exclusivity provision contained in Rule 74.1103(e). Then the Commission on its own motion went a step further and added:

“IT IS FURTHER ORDERED, That Total Telecable, Inc., IS DIRECTED to comply with the requirements of Section 74.1103(e) of the Commission’s rules on its CATV systems serving Anacortes, Bellingham, Burlington, Mount Vernon, and Sedro Woolley, Wash. within 30 days of the release date of this memorandum opinion and order.” (7 F.C.C. 2d at 623) (R. p. 113)

The Commission did not explain by citation or reference under what statutory authority it was acting for the issuance of such an order. Nor were any factual findings made as to what duplication was in progress and what exclusivity was required. Moreover, no examination or testing was made of the public interest to determine if the Commission’s preconceptions of protection of local television required the drastic action ordered.

The Commission’s order forcing petitioner to insure exclusivity is proscriptive in nature and tantamount to a cease and desist order under Section 312 of the Act, 47 U.S.C. 312.

Similar summary action by the Commission operating under the new CATV rules has recently been condemned and reversed by this Court in *Southwestern Cable Co. v. United States*, 378 F.2d 118 (9th Cir., 1967). In that case the Commission ordered a freeze on the expansion of a CATV system carrying Los Angeles television stations into the San Diego area while it investigated the effect of such carriage. In its petition for review the CATV system challenged the Commission’s authority to issue such an order and at the same time broadly attacked the Commission’s power and authority over CATV and the constitutional validity of its *Second Report and Order*, 2 F.C.C. 2d 725 (1966).

In response, the Commission contended that its action was not a cease and desist order under 47 U.S.C. 312, but

was a grant of temporary relief under Section 74.1109 (f), which in turn, it claimed, was an exercise of its rule making authority under Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. 154(i) and 303(r). The Court rejected this argument pointing out that the order was prohibitory in nature and thus amounted to a cease and desist order, and that the Commission could not circumvent the safeguards of 47 U.S.C. 312 by misapplication of its rule making authority. In its careful opinion, Judge Barnes explained that “the method of regulation of broadcasting chosen by Congress was *licensing*” and “4(i) and 303(r) are limited to the scope of the Commission’s *licensing authority*”. The Court concluded that as against a *non-license*, the Commission’s only authority to issue proscriptive orders was limited to action under 47 U.S.C. 312, with the safeguards of a full adjudicatory hearing as provided in that section.

Here the Commission’s action is even more proscriptive in nature than in *Southwestern*, since petitioner is ordered not just to maintain the *status quo*, but to cease and desist from operating an existing part of its business, maintained for over sixteen years. As in *Southwestern, supra*, such an order must fail because it was issued without the minimum safeguards provided by Congress under Section 312.

D. Enforcement of Exclusivity Provision by the Local Broadcaster Is an Unreasonable Restriction and Delegation of Authority

Under the Commission’s new CATV rules, exclusivity is not automatic but must be invoked, oddly not by the Commission’s action, but by action and request of the competitor television station under Section 74.1103(f), which provides:

“Where a station is entitled to program exclusivity the CATV system shall, upon the request of the

station licensee or permittee, refrain from duplicating any program broadcast by such station.”

This rule places in the hands of the preferred TV broadcaster the power to invoke the rules at will. It delegates to the local commercial station the regulation and control of communications matters which Congress has exclusively delegated to the Commission. Underlying this rule is the Commission's stated belief that CATV duplication constitutes unfair competition. The Commission has neither the authority nor the jurisdiction to determine questions of unfair competition. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965). Regulation and control to prevent unfair methods of competition fall under the jurisdiction of the Federal Trade Commission, 15 U.S.C. 45(a). The Commission has no similar authority. Not only has the Commission selected television broadcasting for special preferential treatment, but it has placed in the broadcaster's hands the additional economic force of control of these rules. Manifestly such a rule is unwise, unfair, and invalid.

This delegation of enforcement of the CATV rules to the competitor industry is in conflict with *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), where the Supreme Court emphasized that the Communications Act, unlike many other industry regulatory acts, “recognizes that the field of broadcasting is one of free competition.” Free competition, according to the Commission's erroneous view, exists only for the favored class, and will all but disappear as between broadcaster and CATV if the F.C.C. can delegate authority to the competitive industry a practice of enforcing a scheme of exclusivity of broadcasting in carriage of programs by CATV systems.

E. The "Storer Doctrine" Supports a Hearing in a Waiver Petition and Before Issuance of a Proscriptive Order on the Merits

Respondents rely principally on *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964); and *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir. 1966). This reliance is misplaced for none of these cases condoned proscriptive action against non-licensees in a waiver proceeding.

In *Storer* the Commission promulgated rules limiting the number of television stations in the hands of a single owner to five stations. Storer, already owning five, was denied application for a sixth. Storer challenged the rule and the denial of a hearing on its application. The Supreme Court held that the Commission could deny the application without a hearing and that to receive a hearing, Storer should have applied for a waiver setting forth sufficient reasons.

Federal Power Commission v. Texaco, 377 U.S. 33 (1964), upheld the F.P.C.'s summary denial of an application for public convenience and necessity involving contracts with pricing agreements other than those permissible under F.P.C. regulations. Relying on *Storer, supra*, the Court explained that the statutory requirement for a hearing does not preclude an administrative agency "from particularizing statutory standards through the rule making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." 377 U.S. at 39. But the Court hastened to point out that this denial of the application was not a decision on the merits and directed attention to the waiver procedure. "Facts might conceivably be alleged sufficient on their face to provide a basis for waiver of the price-clause rules and for a hearing on the matter" (337 U.S. at 40-41).

On remand, *Pan American Petroleum Corp. v. Federal Power Commission*, 352 F.2d 241 (10th Cir. 1965), the circuit court reiterated the Supreme Court's holding that the denial did not pass on the merits and again directed attention to the waiver provisions, which under proper circumstances would permit a hearing. The court stated:

"If the effect of the questioned orders is to deprive a petitioner of a substantive right, the way is left open for the protection of that right. The Commission's [FPC] Rules of Practice and Procedure, Section 1.7(b), permit a request for a rule waiver in a rate filing. This opens the way for a party who claims aggrievement by a regulation to obtain a review of its applicability to his particular situation." 352 F.2d at 245.

See also *Sun Oil Co. v. F.P.C.*, 355 F.2d 181 (5th Cir., 1965), citing, *Texaco, supra*, in holding that a waiver petition is the proper route to receive an evidentiary hearing.

Following the Supreme Court's teaching in *Storer* and *Texaco*, petitioner here applied for a *waiver* of the Commission's rules to maintain its existing service and preserve the substantial property interest in its sixteen year business. Unlike *Storer* and *Texaco*, the waiver application set forth facts demonstrating that under the particular circumstances the public interest was not adversely affected and that enforcement of the rule would threaten petitioner's business. The Commission ignored the waiver application and the facts asserted therein and summarily dismissed the petition without hearing. It acted in the same manner as if petitioner had challenged the rule without requesting waiver, as provided in the rules and as recommended in *Storer*. Further, the Commission did not merely deny the application but it passed

upon the merits, ruled on the public interest, and ordered compliance with its rule within 30 days, thus threatening petitioner's existing business. While purportedly proceeding under *Storer* and *Texaco*, the Commission has ignored its teaching as applied to waiver petitions.

Respondents also rely upon *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F.2d 624 (D.C. Cir., 1966). With respect to rule-making, the D.C. Circuit *en banc* held that an agency could properly "promulgate rules of general application consistent with the Act and . . . deny an adjudicatory hearing to applicants [for licenses] whose applications on their face showed violations of the rule" (359 F. 2d at 328).¹⁸ But in the field of communications, the Supreme Court has made plain that "the Congress has not, in its regulatory scheme, abandoned the principle of free competition." *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, at 474. Indeed, the Court in *Sanders* said:

"Plainly, it is not the purpose of the act to protect a licensee against competition . . . Congress intended to leave competition in the business of broadcasting where it found it" (309 U.S. at 475)

Later in *Carroll Broadcasting co. v. F.C.C.*, 258 F.2d 440 (D. C. Cir. 1958), it was explained that the doctrine of "free competition" was tempered only to the degree where it

¹⁸ There is a vast distinction between enactment of rules designed to establish basic minimum standards for applicants for licenses as approved in *American Airlines*, and adoption of rules intended to restrict the conduct of businesses which are neither licensed by the agency nor required to apply for licensing authority, such as in the instant case.

could be demonstrated, on the facts and after hearing, that such competition would result in harm to the public interest. But the court in *Carroll* was careful to emphasize that the presumption is weighed heavily in favor of free competition and that the task of demonstrating injury to the public interest is "certainly a heavy burden" (258 F.2d at 444). Here the purpose of the F.C.C. rule is to restrain competition; the presumption of the rule is that the favored broadcaster is entitled to protection from competition; and the burden has, by rule, been shifted to the CATV system to demonstrate that it is entitled to compete freely. In short, the rule complained of here is "inconsistent" with the Act since it reverses the established basic current of communications law that free competition is to be presumed.

Accordingly, the rule fails the test imposed by *American Airlines, supra*, since an agency may issue rules of general application only if they are "consistent with the Act" (359 F.2d at 628). Thus, the rule [Section 74.1103] itself is unlawful.

In *American Airlines, supra*, the D. C. Circuit approved agency procedures adopting a regulation permitting only "all-cargo" carriers to provide blocked space service. The "combination" carriers (carrying cargo and passengers) protested that the rule affected existing certificates of convenience and could not issue until after a full adjudicatory hearing. In rejecting the argument, the court cited *Storer* and *Texaco* and expanded the doctrine of these cases as applying to rights under existing certificates, as well as prospective rights in applications for certificates.

In *American Airlines*, the D. C. Circuit has gone further than any other¹⁹ in applying the *Storer* doctrine, as the three dissenting judges pointed out:

“*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) upon which the majority chiefly relies, as well as *F.P.C. v. Texaco*, 377 U.S. 33 (1964), and *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), are cases dealing with rulemaking applying *across the board to all applicants* for licenses of certificates. Petitioners there were not being deprived of any authority they had formerly exercised; in those cases rule-making was used to formulate reasonable, non-discriminatory criteria to be met as conditions of receiving certificates in the first place.” (359 F.2d at 635).

But even with this broad expansion, the court did not go so far as respondents ask the Court to go here. There complainants did not apply for waiver, but broadly challenged the Commission’s power to regulate. The regulation and ruling contained no proscriptive order applicable to *non-licensees*,

¹⁹ Compare this Circuit’s opinion in *Superior Oil Company v. Federal Power Commission*, 322 F. 2d 601 (9th Cir., 1963), *cert. denied*, 377 U.S. 922 (1964), which upheld summary denial of *applications* involving prohibited contract escalation clauses, but distinguished existing rights:

“But the rules here under challenge are not adjudicatory in nature. They do not affect any contractual right which was in existence when the rule became effective. The problem would be different if the effect of the rules was to prescribe rates already in effect.” (322 F.2d at 615).

but issued to apply only to those over which it had direct regulatory authority and control. Moreover, despite its ruling, the court held the door open to make whatever showing or submit evidence to show the direct harm of the regulation. The court noted in passing that to date no harm had resulted from the regulation and that there was a possibility of proceeding merely to delay the effect of the new regulation.

Here, the Commission has issued in a waiver procedure a proscriptive order against a non-licensee halting a substantial part of its existing business without so much as allowing a minimum hearing or the presentation of evidence in support of its allegations. The Commission's action and order exceeded its statutory and regulatory authority, and under the suggested action in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) and *F.P.C. v. Texaco*, 377 U.S. 33 (1964), petitioner is entitled to a hearing in its waiver petition.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court enjoin, set aside, vacate and declare unlawful the order of the Federal Communications Commission as contained in its memorandum opinion and orders of April 4 and July 14, 1967; that it declare unlawful the CATV Rules promulgated by the Federal Communications Commission as beyond the jurisdiction of the Commission; or in the alternative, that it declare that the Petitioner is entitled to a full evidentiary hearing on its petition for waiver; and that

it remand the matter to the Commission with instructions to conduct an evidentiary hearing consistent with the Court's opinion.

Respectfully submitted,

/s/ JOHN P. COLE, JR.
ROGER E. ZYLSTRA
ALAN RAYWID

Munsey Building
Washington, D.C. 20004

Attorneys for Petitioner
TOTAL TELECABLE, INC.

Of Counsel:

COLE, ZYLSTRA & RAYWID

Munsey Building
Washington, D.C. 20004

October 6, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Alan Raywid

APPENDIX—A

Legislative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

After lengthy hearings on September 5, 1959, during the 86th Congress, First Session, the Committee on Interstate and Foreign Commerce submitted Senate Report 923 accompanying and recommending passage of Senate Bill S. 2653, entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over Community Antenna systems." The bill provides as follows:

That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by inserting at the end thereof the following: "(hh) 'Community antenna television system' means any facility performing the service of receiving and amplifying the signals transmitting programs broadcast by one or more television stations and redistributing such programs, by wire, to subscribing members of the public, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises, or (3) any such facility used only for the distribution, by wire, of programs for which a charge is imposed generally on all subscribers wherever located and which are not in the first

instance broadcast for reception without charge by all members of the public within the direct range of television broadcast stations.”

Sec. 2. Section 3 (h) of the Communications Act of 1934 (47 U.S.C. 153) is amended to read as follows:

“(h) ‘Common carrier’ or ‘carrier’ means any person engaged as a common common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier.”

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

“COMMUNITY ANTENNA TELEVISION SYSTEMS

“Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided*, That a Community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further*, That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

“(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315, and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefor, licensees thereof and operators thereof.

“(b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radiocommunications shall be deemed to apply also to all matter distributed to its subscribers by a community antenna television system.

“(b) (3) The provisions of section 319 relating to construction permits shall apply also to the construction and licensing of a community antenna television system: *Provided*, That the Commission, if it finds that the public interest, convenience and necessity would be served thereby, may waive the requirement of a permit for such construction.

“(c) The public interest, convenience, and necessity will be deemed to be served by the grant of an application for a license for the provision of existing program services by a community antenna television system which was in operation on the date of the enactment of this section subject to such conditions as the Commission may impose under subsection (d) hereof.

“(d) (1) Either prior to or within thirty days after the grant of an application for a license or a renewal thereof for a community antenna television system which was in operation on the date of the enactment of this section, the licensee of a television station assigned to a community in which such community antenna television system serves subscribers may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued

operation of a television station which is providing the only available locally originated television broadcast program service.

“(d) (2) Such petition shall describe, in detail, the proposed operating conditions, and shall set forth, with particularity, the material effect of the proposed conditions on such continued television station operation. The community antenna television system shall be afforded an opportunity to respond to such petition within thirty days after public announcement of the filing thereof. After the expiration of such thirty-day period, the Commission shall determine whether the petition meets the foregoing requirements, and, if it does, shall determine whether, with due regard to service rendered by the community antenna television system and by petitioner’s station, the public interest, convenience and necessity would be served by the adoption of the proposed or any other operating conditions. Public evidentiary hearings shall be held thereon if requested by either the petitioner or the community antenna television station within thirty days after public announcement of such determination, or if ordered by the Commission on its own motion prior to its determination.

“(d) (3) Any community antenna television system license issued under subsection (c) above shall be subject to conditions imposed in accordance with this subsection but any such license so issued shall not be stayed pending the Commission’s final decision on any petition filed hereunder.

“(e) Findings by the Commission as to the effect upon the public interest, convenience, and necessity of the grant of an application or renewal or modification *thereof* for a community antenna television system which was not in operation on the date of

the enactment of this section or for modification of a license for a community antenna television system which was in operation on the date of enactment of this section shall be made with due regard for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service. The provisions of section 309 shall apply to the issuance of licenses, modifications, and renewals thereof under this subsection.

“(f) (1) Upon application by the licensee of a television broadcast station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system provides television programs to local subscribers, the Commission may require that such community antenna service shall regularly redistribute programs broadcast by such local television broadcast station.

“(f) (2) The Commission may, by rule or order, prescribe such standards and conditions as it may find necessary to assure that the reception of the programs redistributed by the community antenna television system under subsection (1) shall be reasonably comparable in technical quality to the reception of programs of other television stations redistributed by the community antenna television system.

“(f) (3) The Commission also may, by rule or order, prescribe the period of time within which community antenna television systems shall complete preparations for and commence the redistribution of programs under subsections (1) and (2).

“(g) The Commission shall prescribe appropriate rules and regulations in order to avoid the duplication of programs broadcast or scheduled to be broadcast

by a television station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system serves subscribers by such community antenna television system redistributing the signals of another television station. In promulgating such rules and regulations the Commission shall be guided by the standard set forth in subsection (e) of this section, requiring that due regard be given for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service.”

The Committee report explained the purpose of the bill was to place CATV under the jurisdiction of the FCC.

This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communications Act affecting regular broadcasters that are to apply to the community antenna television systems.

(Senate Report 923, p. 3)

The Report summarized the Commission's treatment of CATV since its inception and referred to its disclaimer of jurisdiction in *Frontier Broadcasting v. Collier*, 16 Pike and Fischer R.R. 1005 (April 1958).

The question of the FCC's jurisdiction over community antenna television systems and the type of

regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by individual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (See *Frontier Broadcasting Company v. Collier*, 16 R.R. 1005 (April 1958). The Commission's final action in this matter made it perfectly clear that it did not intend to regulate CATV systems in any way whatsoever. However, on May 22, 1958, the FCC instituted an inquiry into the impact of community antenna television systems, television translators, television satellite stations, and television reflectors upon the orderly development of television broadcasting (docket No. 12443) and included as part of that proceeding the reconsideration of the above-mentioned *Frontier Broadcasting* case. (Senate Report 923, p. 5)

After several amendments to the bill were offered, S. 2653 was debated on the Senate floor on May 17 and 18, 1960. Senator Pastore, chairman of the sponsoring committee, was the floor leader and explained that the bill was not designed to hurt CATV, but merely place it under regulatory control:

This bill is not directed in any way toward injuring CATV as such. We seek merely to place CATV systems under regulation in order to protect their rights, and also to protect the rights of the only available broadcasting station, which may perish and go out of

existence unless proper reforms are taken now of a very moderate nature.

(106 Cong. Rec. 10417)

Senator Pastore was questioned at length on the purposes of the bill and explained it was a new delegation of authority of jurisdiction over CATV. In a brief colloquy Senator Pastore stated:

Mr. CURTIS. First, I thank the distinguished Senator for his long efforts in a difficult area. I have given very limited study to S. 2653. It appears to me that the proposed legislation places the community antenna systems under the jurisdiction of the Federal Communications Commission. To that extent there is a delegation of authority to them. Does the bill directly prohibit or outlaw any act that the community antenna systems are doing now?

Mr. PASTORE. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.

Mr. CURTIS. The bill grants to the Commission the right to look into that situation?

Mr. PASTORE. And to make rules and regulations.

Mr. CURTIS. To make rules and regulations.

But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?

Mr. PASTORE. I would not say so, unless the Senator sees something in the bill to the contrary.
(106 Cong. Rec. 10425)

In answer to questions by Senator Kerr, an opponent of the bill and the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grant was necessary to develop an orderly system of TV:

Mr. PASTORE. Then it is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the duties that are imposed upon a CATV organization where there is no problem, I would assume the action of the Federal Communications Commission would be nothing more than perfunctory.
(106 Cong. Rec. 10426)

The Kerr-Pastore debate demonstrated that the issue before the Senate was whether the FCC was to gain jurisdiction over CATV through the passage of the amendment—jurisdiction which it admittedly lacked:

Mr. KERR. Did it ever occur to the Senator from Rhode Island that there are hundreds and thousands of American businesses in operation who are praying unto the Lord and their Government to protect them by keeping them free of regulation, rather than imposing it on them and then having them depend upon a legislative record made on the floor of the Senate which, if someone downtown whose identity we do not know, is controlled by it, will let them loose after they have paid a bunch of lawyers in Washington to come down to get them loose?

The Senator says he cannot write a bill to protect these people. Apparently the Senator does not know his own ability.

* * *

Mr. PASTORE. There was not one representative of a CATV who appeared before our committee who did not say that he wanted to be regulated. I call as my chief witness the Senator from Oklahoma [Mr. MONRONEY], who is going to make the motion to recommit the bill. As a matter of fact, Senator MONRONEY introduced a bill himself to regulate the entire industry. However, that bill is only a shell. It does put them under regulation, but it does not regulate.

Mr. KERR. Next to not being under it, that is the best shape one can be in.

(106 Cong. Rec. 10426)

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. KERR. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. PASTORE. I did not say that.

Mr. KERR. That is what the Senator did say.

Mr. PASTORE. I said the CATV would not have any right to go before the FCC.

Mr. KERR. Who says they would not?

Mr. PASTORE. I say so.

Mr. KERR. Who prescribes that?

Mr. PASTORE. Because the Senator says they should be put under the CATV. That is just the point.

Mr. KERR. Cannot a person go into court and ask for justice, without being set aside by the court?

Mr. PASTORE. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. KERR. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. PASTORE. I am not silly. I am talking about jurisdiction.

Mr. KERR. So am I.

Mr. PASTORE. I am talking about jurisdiction, and there is nothing silly in it.

Mr. KERR. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

Mr. PASTORE. A petition to do what?

Mr. KERR. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.

Mr. PASTORE. The Senator could not be more wrong than he is.

(106 Cong. Rec. 10429)

Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters.

The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency

available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequencies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established.

(106 Cong. Rec. 10535)

Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

Mr. LONG of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?

Mr. MONRONEY. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.

Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated.

So we do not regulate—and I do not think we should—the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.

But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways. (106 Cong. Rec. 10536)

Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

Mr. McCLELLAN. The meaning of the word “facilitate,” as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid.

In other words, the station owner could petition the Federal Communications Commission to impose conditions that will facilitate, that will aid, that will remove any difficulty, that will remove encumbrance or hindrance to the continued operation of that station.

Mr. MONRONEY. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.

* * *

Mr. McCLELLAN. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing,

but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred consideration in competition with another station.

(106 Cong. Rec. 10537)

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

Mr. LONG of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:

A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury of hardship on the television station. However, to say that it could be required to operate in a manner to facilitate the continued operation of the competitor and system in his business, is too much to ask.

* * *

Mr. LONG of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs.

(106 Cong. Rec. 10541)

Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon FCC was constitutional.

Mr. HICKENLOOPER. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.

It seems to me that a rather complicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.

Mr. MONRONEY. That is correct.

Mr. HICKENLOOPER. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.

Mr. MONRONEY. That is correct.

Mr. HICKENLOOPER. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the signal out of the air by means of an aerial erected on top of my house?

Mr. MONRONEY. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate.

(106 Cong. Rec. 10543)

The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

Mr. KERR. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses.
(106 Cong. Rec. 10544)

The bill was recommitted by a vote of 39 to 38, 106 Cong. Rec. 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television.
(106 Cong. Rec. 11462)

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

On February 22, 1961 in the 87th Congress, 1st Session, S. 1044 was introduced, entitled "a bill to amend the Communications Act of 1934 to authorized the Federal Communications Commission to issue rules and regulations with respect to community antenna television systems." Placed in the record was an explanatory statement prepared by the Commission, which states in part:

In examining into this matter the Congress considered numerous legislative proposals and held hearings thereon. Two of these proposals, S. 2653 and H. R. 11041, would have established a broad-scale and mandatory licensing scheme for the some 500-700 community antenna television systems which are already in existence, as well as those proposed to be established in the future. While the Commission was in accord with

the general objective of these bills, it expressed the view that they were unnecessarily comprehensive in scope; would reach into situations which did not affect local television stations; and would unnecessarily add to the already large licensing functions of the Commission.

In contrast to the unduly widespread scope of these bills, the instant proposal is designed to vest in the Commission authority to act in those situations where local television stations are operating under inequitable disadvantages in competition with community antenna television systems. The Commission would thereby be enabled to address itself to the problem situations in the CATV-local station areas under a general power to make appropriate adjustments through the issuances of appropriate rules, regulations, and orders. The Commission would not, however, be encumbered by the administration of a mandatory licensing scheme for community antenna television systems, including the large number of such systems which are providing the only television service to sparsely settled areas.
(107 Cong. Rec. 2524)

Another instance of the way in which the Commission's jurisdiction might be exercised in appropriate situations lies in the field of duplication by CATV systems of programs being carried by the local station. The Commission would be empowered under the proposed legislation to order such adjustments as would, on an appropriate basis, permit the CATV system to continue to provide multiple television services, and at the same time afford to the local station some protection in its program offerings.

Since this legislative proposal looks to a limited jurisdiction over CATV's under the Communications Act of 1934, as amended, the enforcement and review

provisions in section 312 (b) and titles 4 and 5 of the act would be available in connection with rules, regulations, and orders issued by the Commission with respect to CATV operations. (107 Cong. Rec. 2524)

Implicit in this memorandum is the understanding that such legislation was necessary in order to authorize the Commission to promulgate rules and regulations over CATV.

III

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4689. ¹ It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulatory scheme or rules as did S. 2653, but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words its chairman, a confirmation of jurisdiction.

The Commission had determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.

* * *

¹ Citations to pages from the 89th Congress are to the daily edition, since the permanent edition is not yet available.

Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries. (112 Cong. Rec. 4690)

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER REGARDING PROPOSED CATV LEGISLATION

I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 R R 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

* * *

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.
(112 Cong. Rec. 4691)

The bill S. 3017, contains the following language:

“That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof a new subsection to read as follows:

“(gg) ‘Community antenna system’ means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service.”

SEC. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

“COMMUNITY ANTENNA SYSTEMS”

SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

“(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

“(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

“(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

“(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State

or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated hereunder."

IV

Again in the 89th Congress 2d Session a bill was introduced conferring jurisdiction over CATV. On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued Report No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

(b) Subsection (h) of such section 3 is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where

reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."

SEC. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"COMMUNITY ANTENNA SYSTEMS"

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority —

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on

March 1, 1966, resulting from the limited channel capacity of any such systems.

- “(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.
- “(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.
- “(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it.”

In the purposes of the legislation the Committee was cautious not to challenge the FCC's already assumed jurisdiction.

The principal purposes of the legislation are to —

(1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems. (H. R. Rep. No. 1635, p. 2.)

The Committee pointed out that although the Federal Communications Commission had asserted its jurisdiction over CATV, the Committee would not state a position, except to say that the Congress should confer this jurisdiction.

In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.

It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems. (H. R. Rep. No. 1635, p. 9)

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress to confirm jurisdiction which it had assumed.

The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out

the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate. (H.R. Rep. No. 1635, p. 16)

Commissioner Loevinger issued a separate statement explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary. (H.R. Rep. No. 1635, p. 20)

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those

persons who are dependent upon off-the-air service and those who may receive cable service.

(H.R. Rep. No. 1635, p. 21)

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give its jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a

person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this

attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does

cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires

that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

* * *

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate. (H.R. Rep. No. 1635, pp. 23-29)

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.

Apparently uncertain of its ground, the Commission prepared and suggested a most peculiar piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.

Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of

Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

* * *

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copy-right laws to material carried by CATV systems.

The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed. (H.R. No. 1635, pp. 26-27)

The bill failed to reach the floor for vote.

APPENDIX B**Statutes and Administrative Rules
Administrative Procedure Act, 5 U.S.C.
Sections:****Section 551 - Definitions**

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

Section 551 (Cont.)

(F) requirement, revocation, or suspension of a license;
or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

Section 554 - Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

Section 554 (Cont.)

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

**Section 556 - Hearings; presiding employees;
powers and duties; burden of proof; evidence;
record as basis of decision**

(a) This section applies, ~~according to~~ the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
- (7) dispose of procedural requests or similar matters;
- (8) make or recommend decisions in accordance with section 557 of this title; and
- (9) take other action authorized by agency rule consistent with this subchapter.

Section 556 (Cont.)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

**Section 557 - Initial decisions; conclusiveness;
review by agency; submissions by parties;
contents of decisions; record**

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by

Section 557 (Cont.)

rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 558 - Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

Section 558 - (Cont.)

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Communications Act of 1934, 47 U.S.C. Sections:**Section 151 - Purposes of act; Creation of Federal****Communications Commission**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,¹ and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 154 - Provisions relating to the Commission

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 - General powers of the Commission

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(M)(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

Section 303 (Cont.)

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act:

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.⁴⁸

Section 307 - Allocation of facilities; term of licenses

(b)⁴⁸ In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 309 - Action upon applications; form of and conditions attached to licenses

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 309 (Cont.)

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.^{54b} Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 312 - Administrative Sanctions

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

Section 312 (Cont.)

(6) for violation of section 1304, 1342, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.⁵⁹

Section 315 - Facilities for candidates for public office

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he

Section 315 (Cont.)

shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby^a imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act^a to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.^{a1b}

Section 316 - Modification by Commission of construction permits or licenses

(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested,

Section 316 (Cont.)

why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.⁶²

Section 317 - Announcement with respect to certain matter broadcast

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Section 317 (Cont.)

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.⁶³

Section 326 - Censorship; indecent language

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.⁷¹

Section 403 - Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Section 508 - Disclosure of certain payments

(a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d), an announcement is not required to be made under section 317.

(e) The inclusion in the program of the announcement required by section 317 shall constitute the disclosure required by this section.

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than \$10,000 or imprisoned not more than one year, or both.¹⁰²

**Selected provisions of the Federal
Communications Commission's CATV
rules and regulations, 47 C.F.R. Sections:**

**SUBPART K—COMMUNITY ANTENNA
TELEVISION SYSTEMS**

【Subpart K (§§ 74.1101-74.1109) as adopted eff. 4-18-66; except for § 74.1103 which is eff. 6-17-66 as it pertains to existing operations of nonmicrowave CATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3-17-66; III(64)-12】

§ 74.1100 Cross reference.

See § 74.11.

【§ 74.1100 adopted eff. 2-28-67; III(64)-16】

§ 74.1101 Definitions.

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the

system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the **system need not carry all such** substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100

watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art) ;

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) ; and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a

network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section) ;

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved ;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity ; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

【§ 74.1103(a) and (b)(3) amended, (b)(4) adopted eff. 2-28-67; III(64)-16】

§ 74.1105 Notification prior to the commencement of new service.

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within

sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities ; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems

which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however*, That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

NOTE 2: As used in § 74.1105, the term "television broadcast station" includes foreign television broadcast stations.

[§ 74.1105 amended in III(64)-16; Note 2 adopted eff. 7-14-67; III(64)-18]

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such a response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission on its own motion or pursuant to a

petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however*, That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: *And provided further*, That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the **specified temporary relief**.

(e) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same pro-

ceeding as the earlier requests.

NOTE 1: As used in § 74.1107, the term "television broadcast station" includes foreign television broadcast stations.

[§ 74.1107 amended in III(64)-16 and III(64)-17; Note 1 adopted eff. 7-14-67; III(64)-18]

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or

considerations relied upon.

(e) The petitioner **may file a** reply to the comments or oppositions within **twenty (20)** days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will

determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

[Subpart K (§§ 74.1101-74.1109) as adopted eff. 4-18-66, except for § 74.1103 which is eff. 6-17-66 as it pertains to existing operations of nonmicrowave CATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3-17-66; III(64)-12; § 74.1109(h) as adopted eff. 6-17-66; III(64)-13.]



United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

*On Petition for Review of Orders of the
Federal Communications Commission*

BRIEF FOR INTERVENOR

FILED

OCT 23 1967

WM. B. LUCK, CLERK

PAUL DOBIN

ROY R. RUSSO

Cafritz Building
Washington, D. C. 20006

Attorneys for Intervenor

October 19, 1967

OCT 23 1967

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	(i)
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	
Station KVOS-TV Is Fully Entitled To All Of The Protection Provided By The Commission's CATV Rules And Regulations	2
CERTIFICATE	6

TABLE OF AUTHORITIES

<i>First Report And Order (CATV)</i>	
38 F. C. C. 683 (1956)	2

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

*On Petition for Review of Orders of the
Federal Communications Commission*

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

KVOS Television Corporation (hereinafter "KVOS-TV") relies upon the statement contained in the Brief for the Respondent, Federal Communications Commission (hereinafter "the Commission") for a summary of the proceedings below.

ARGUMENT

Intervenor adopts the Brief of the Commission. It addresses itself herein to the contention made here by Petitioner that KVOS-TV is not entitled to the regular protection afforded by the Commission's Rules.

Station KVOS-TV Is Fully Entitled To All Of The Protection Provided By The Commission's CATV Rules And Regulations

In its decision here under review, the Commission re-affirmed the basis for its policy granting television stations protection against duplication of their programs by CATV systems importing signals into the service area of a local station (R. 111-112, para. 4). The Commission, in its decision establishing the non-duplication rules, determined that these rules provided necessary protection for local stations against the unfair competition which would result from such duplication of their programs. The Commission stated that these rules preserve "to local stations the credit to which they are entitled — in the eyes of advertisers and the public — for presenting programs for which they had bargained and paid in the competitive program market" (Para. 80, *First Report and Order*).

Petitioner's position is that because of what it considers special circumstances, Station KVOS-TV is not entitled to the same protection against unfair competition. It alleges (Brief, p. 46) that the normal protection against unfair competition afforded to all other television stations should not

be granted to KVOs-TV because of Petitioner's allegation that KVOs-TV receives the largest portion of its revenue as a result of the fact that it has viewers in Canada. The Commission in its decision held that this was an irrelevant consideration in applying the non-duplication policies and rules. In deciding whether the Commission's judgment was correct, it is appropriate to note the undisputed evidence before it which demonstrated that Station KVOs-TV is a fully American station required by the Communications Act to serve the needs and interests of the United States viewing public which is within its viewing area. The evidence further established beyond dispute that Station KVOs-TV fully meets its responsibilities as a licensee of the Federal Communications Commission.

In opposition to the Petition for Waiver, Intervenor made reference to its November 10, 1965 application for renewal of license which set forth in great detail the manner in which Station KVOs-TV fulfills its obligations as a licensee under the Communications Act (R. 40). In addition, in opposition to a Petition in Support of Request for Waiver, filed by KIRO, Inc., licensee of Station KIRO-TV, Seattle Washington (R. 68 through 104), KVOs submitted voluminous information demonstrating the nature of its local programming, with particular emphasis on educational and children's programming. The Petitioner at no time has controverted these facts. ¹

¹ The licensee of KIRO-TV, in its Petition in Support of Request for Waiver (R. 55), alleged that it supplies significant public service programming to communities served by Petitioner's CATV systems. However, Intervenor effectively refuted KIRO-TV's suggestion that this demonstrated that there is no need for KVOs-TV's local service (R. 73 and 82).

Petitioner disregards the fact the Intervenor has a large viewing audience in the United States and that the size of the audience is very important economically to KVOs-TV. In its Petition for Waiver (R. 4), Petitioner made the bare allegation that Station KVOs-TV does not rely on the communities served by Petitioner's CATV systems for its advertising revenues. However, at Paragraph 10 of the same Petition for Waiver (R. 5), Petitioner recognized that KVOs-TV is credited by the American Research Bureau with substantial net weekly circulation and average daily circulation within its large coverage area in the State of Washington. KVOs-TV made clear in its own pleadings, and it has not been disputed that its own network hourly rate is determined solely by the extent of its *domestic* audience (R. 6, 41, 49). Contrary to Petitioner's claim, the undisputed facts before the Commission demonstrated that loss of audience to KVOs-TV as a result of the failure of Petitioner's CATV system to provide non-duplication protection to KVOs-TV would be of extreme significance.

Under these circumstances, the Commission properly concluded (R. 112) that nothing alleged by the Petitioner had a material bearing on the basis for the Commission's non-duplication rules to protect local stations against unfair competition or provided a proper basis for waiver of the rules. Given the fact that KVOs-TV has a substantial domestic audience in the Northwest Washington area, and that *this audience* forms the basis for its network base hourly rate, the Commission correctly concluded that KVOs-TV's service to and revenues from its Canadian audience are irrelevant and immaterial to the disposition of Petitioner's waiver request since they do not affect the existence of the unfair competition which would result from duplication of Intervenor's programs. Indeed, nowhere in its Brief or in its Petition for Waiver before the Commission does Petitioner deny that

importation of distant signals which duplicate the same day programming of KVOs-TV would constitute unfair competition. Petitioner merely suggests that "unfair competition" is none of the Commission's business (Brief, p. 52, and Petition for Waiver, Para. 26 (R. 16)). We do not repeat here the answer to this argument set out at length in the Commission's Brief.

Petitioner also claims that affording Intervenor non-duplication protection would virtually eliminate two Seattle stations from its systems (Brief, p. 46). This claim, however, is totally without merit. In support of its request for waiver of the non-duplication rules, Petitioner had stated that it would be required to delete the two Seattle stations from its systems *or install switching equipment which would be required for this purpose* (R. 7). It has not alleged that it will suffer greater hardship or difficulty than all of the other CATV systems which have complied with the Commission's non-duplication rules by the installation of such switching equipment. No allegation was made that Petitioner could not afford such equipment. On the contrary, its own Petition showed that it has a total of 8,600 subscribers (R. 1-2) and there was no basis for the claim that the installation of this equipment would place an unjustifiable hardship upon it.

In this connection, it is important to point out that the Commission's non-duplication rules do not deprive the public of any programs which the Seattle stations might present. The non-duplication provisions only require deletion of the Seattle broadcasts when they are identical with programs which can be viewed over Intervenor's station. Nothing in the Commission's rules requires that programs provided by sources other than Intervenor must be deleted from CATV systems, whether such programs are presented by the Seattle stations or by the CATV system itself. There can therefore be no

loss of programs to the public. All the Commission requires is that the programs presented at great expense by local stations be free of duplication in a manner consistent with the Commission's basic television allocation plan.

Respectfully submitted,

/s/ PAUL DOBIN
ROY R. RUSSO

Cafritz Building
Washington, D. C. 20006

Attorneys for Intervenor
KVOS Television
Corporation

October 19, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ PAUL DOBIN

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

No. 21, 990

TOTAL TELECABLE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF MEMORANDUM OPINIONS AND
ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

DONALD F. TURNER,
Assistant Attorney General,

HENRY GELLER,
General Counsel,

HOWARD E. SHAPIRO,
Attorney.

JOHN H. CONLIN,
Associate General Counsel,

EDWARD J. KUHLMANN,
Counsel.

Department of Justice
Washington, D. C. 20530

Federal Communications Commission
Washington, D. C. 20554

FILED

OCT 30 1967

SUBJECT INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
COUNTERSTATEMENT OF THE CASE	2
1. Background	2
A. The National Television Allocations Structure.	2
B. The Impact of Community Antenna Television Systems.	3
2. The Present Proceeding	10
QUESTIONS PRESENTED	14
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. THE COMMUNICATIONS ACT GIVES THE COMMISSION THE AUTHORITY IT HAS ASSERTED OVER COMMUNITY ANTENNA TELEVISION SYSTEMS.	16
A. Regents v. Carroll, Which Involved A Contractual Dispute Between A Broadcast Licensee And A Third Party, Does Not Resolve The Question Of The Commission's Jurisdiction Over An Entity Engaged In Interstate Communication By Wire, An Activity Expressly Subject To The Commission's Regulatory Authority.	17
B. Since CATV Systems Are Engaged In Interstate Communication By Wire Or Radio, They Fall Within The Ambit Of The Commission's Regulatory Authority.	20
II. THE COMMISSION PROPERLY DECLINED TO HOLD A HEARING ON PETITIONER'S REQUEST THAT IT BE EXEMPTED FROM THE OBLIGATION TO COMPLY WITH THE NONDUPLICATION RULE.	28
A. Where General Rules Applicable To A Broad Class Of Persons Are Adopted In Accordance With Prescribed Rule Making Procedures, The Commission Is Not Required By Statute To Hold Separate Adjudicatory Hearings Before The Rules Can Become Effective.	30

	<u>Page</u>
B. Denial Of A Hearing Did Not Deprive Petitioner Of Due Process Of Law, Nor Is It A Taking Of Property.	34
C. Since Petitioner's Request For A Waiver Did Not Set Forth Allegations Sufficient If True To Warrant An Exemption, No Hearing Was Required.	37
III. THE NONDUPLICATION RULE DOES NOT UNCONSTITUTIONALLY RESTRICT PETITIONER'S RIGHT OF FREE SPEECH.	43
CONCLUSION	46

TABLE OF AUTHORITIES

ases:

Page

<u>American Airlines v. Civil Aeronautics Board</u> , 359 F.2d 624 (D.C. Cir. 1966) <u>cert. denied</u> 385 U.S. 843.	32,33
<u>Airline Pilots Association, International v. Quesada</u> , 276 F.2d 892 (2nd Cir. 1960).	33,35
<u>American Trucking Assoc. v. United States</u> , 344 U.S. 298 (1953).	27
<u>Atlantic Coast Line R. Co. v. Goldsboro</u> , 232 U.S. 548 (1914).	35
<u>Bi-Metallic Investment Co. v. State Board</u> , 239 U.S. 441 (1915).	36
<u>Buckeye Cablevision v. Federal Communications Commission</u> , F.2d — D.C. Cir. Case No. 20,274, decided June 30, 1967.	16,17,18,21, 23,28,31,45
<u>California Citizens Band Assoc., Inc. v. United States</u> , 375 F.2d 43 (9th Cir. 1967) <u>cert. denied</u> 36 U.S. L. Week 3130.	32,33,43
<u>Cedar Rapids Television Co. v. Federal Communications Commission</u> , D. C. Cir. Case No. 20,783, decided September 27, 1967.	38
<u>Channel 9 Syracuse, Inc. v. Federal Communications Commission</u> , D.C. Cir. Case No. 20,843 decided September 26, 1967.	38
<u>Chicago B. & O. R. Co. v. Illinois</u> , 200 U.S. 561 (1906).	33
<u>Civil Aeronautics Board v. Delta Air Lines</u> , 367 U.S. 316 (1961).	31
<u>Clarksburg Publishing Co. v. Federal Communications Commission</u> , 225 F.2d 511 (D.C. Cir. 1955).	6,23
<u>Elm City Broadcasting Co. v. United States</u> , 235 F.2d 811 (D.C. Cir. 1956).	25
<u>Federal Communications Commission v. Pottsville Broadcasting Co.</u> , 309 U.S. 134 (1940).	18,19,20
<u>Federal Power Commission v. Texaco</u> , 377 U.S. 33 (1964).	33,36

Cases:Page

<u>Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.</u> , 289 U.S. 266 (1933).	21,46
<u>Fisher's Blend Station, Inc. v. State Tax Commission</u> , 297 U.S. 650 (1936).	21
<u>Hadacheck v. Los Angeles</u> , 239 U.S. 394 (1915).	35
<u>Idaho Microwave, Inc. v. Federal Communications Commission</u> , 352 F.2d 729 (D.C. Cir. 1965).	21,23
<u>Lafayette Radio Electronics Corp. v. United States</u> , 345 F.2d 278 (2nd Cir. 1965).	43
<u>Logansport Broadcasting Corp. v. United States</u> , 210 F.2d 24 (D.C. Cir. 1954).	2
<u>Metropolitan Television Co. v. Federal Communications Commission</u> , 289 F.2d 874 (D.C. Cir. 1961).	31
<u>National Broadcasting Co. v. United States</u> , 319 U.S. 190 (1943).	15,19,20,23,26,31,43,44
<u>Niagara Mohawk Power Corp. v. Federal Power Commission</u> , 379 F.2d 153 (D.C. Cir. 1967).	27
<u>Philadelphia Broadcasting Co. v. Federal Communications Commission</u> , 359 F.2d 282 (D.C. Cir. 1966).	19
<u>Regents of Georgia v. Carroll</u> , 338 U.S. 586 (1950).	14,16,17,18
<u>Reinman v. Little Rock</u> , 237 U.S. 171 (1915).	35
<u>Southwestern Cable Co. v. United States</u> , 378 F.2d 118 (9th Cir. 1967) <u>cert. pending</u> 36 U.S. L. Week 3045.	16,27
<u>Standard Airlines, Inc. v. Civil Aeronautics Board</u> , 177 F.2d 18 (D.C. Cir. 1949).	31
<u>Trinity Methodist Church South v. Federal Radio Commission</u> , 62 F.2d 850 (D.C. Cir. 1932), <u>cert. denied</u> 288 U.S. 599 (1933).	34
<u>United Artists Television, Inc. v. Fortnightly Corp.</u> , 255 F. Supp. 177 (D.C. S.D. N.Y. 1966), <u>affirmed</u> , <u>Fortnightly v. United Artists</u> , 377 F.2d 872 (2nd Cir. 1967).	11,22,23

<u>Cases:</u>	<u>Page</u>
<u>United States v. Missouri Pac. R. Co.</u> , 278 U.S. 269 (1929).	25
<u>United States v. Storer Broadcasting Company</u> , 351 U.S. 192 (1956).	13,33,37
<u>Ward v. Northern Ohio Telephone Co.</u> , 300 F.2d 816 (6 Cir. 1962), <u>cert. denied</u> , 371 U.S. 820.	21
<u>Weaver v. Jordan</u> , 49 Cal. Rep. 537, 411 P.2d 289 (1966), <u>cert. denied</u> , 385 U.S. 844.	45
<u>Willapoint Oysters v. Ewing</u> , 174 F.2d 676 (9th Cir. 1949) <u>cert. denied</u> 338 U.S. 860.	36

Administrative Decisions:

<u>Black Hills Video Corp.</u> , 5 Pike & Fischer, R.R. 2d 612 (1965).	42
<u>Carter Mountain Transmission Corp.</u> , 32 F.C.C. 459, affirmed, <u>Carter Mountain Transmission Corp. v. Federal Communications Commission</u> , 321 F.2d 359 (C.A.D.C.) <u>cert. den.</u> 375 U.S. 951 (1963).	5,42,44
<u>Collier Electric Co.</u> , 2 Pike & Fischer, R.R. 2d 675 (1964).	42
<u>Consolidated TV Cable Service</u> , 7 F.C.C. 2d 886 (1967).	29
<u>Douglas Antenna Cable TV</u> , 8 F.C.C. 2d 317 (1967).	29
<u>Lee County TV Cable Company</u> , 5 F.C.C. 2d 707 (1966).	29

Statutes:

Administrative Procedure Act, 80 Stat. 378, 5 U.S.C.	
Section 553(c)	31
Section 555(d)	29
Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151 <u>et seq.</u>	
Section 151	2,20,25
Section 152	20,24
Section 153(a)	21

Statutes - cont'd.

	<u>Page</u>
Section 153(b)	21
Section 153(e)	21
Section 154(i)	20
Section 303(f)	20
Section 303(g)	2
Section 303(h)	2, 20
Section 303(r)	20
Section 303(s)	24, 39
Section 307(b)	2, 20, 24, 39
Section 312	19, 28
Section 316	33
Section 325	7
Section 402(b) (7)	28
Section 326	43
Federal Aviation Act, 49 U.S.C. 1371(g).	32

Rules and Regulations of the Federal Communications Commission, 47 CFR (1966):

Section 73.606	2, 24
Section 74.1101(a)	3
Section 74.1103	7, 15
Section 74.1103(e)	1, 9, 43
Section 74.1103(g)	9
Section 74.1105	6
Section 74.1107	40
Section 74.1109(c) (1)	37
Section 74.1109(f)	10, 29

Other Authorities:

<u>First Report and Order</u> , 30 F.R. 6038, 38 F.C.C. 683 (1965).	6, 8, 30, 40, 41, 4
<u>Second Report and Order</u> , 31 F.R. 4540, 2 F.C.C. 2d 725 (1966).	6, 7, 10, 12, 13, 22, 31, 40, 4
<u>CATV and TV Repeater Services</u> , 26 F.C.C. 403 (1959).	5, 42
<u>Sixth Report and Order</u> , 17 F.R. 3905 (1952).	3
<u>Notice of Proposed Rule Making, Docket No. 14895, F.R. 12586 (1962); Further Notice of Proposed Rule Making, Docket No. 14895, and Notice of Proposed Rule Making, Docket No. 15233, 28 F.R. 13789 (1963); Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 15971, 30 F.R. 6078 (1965).</u>	6
H. Rept. No. 1559, 87th Cong., 2d Sess. p. 3 (1962).	24
H. Rept. No. 1850, 73d Cong., 2d Sess. (1934).	26, 39

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,990

TOTAL TELECABLE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF MEMORANDUM
OPINIONS AND ORDERS OF THE FEDERAL
COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This petition for review was filed pursuant to Section 402(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 402(a), and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343.

The case arises from two memorandum opinions and orders of the Federal Communications Commission, released on April 14, 1967 (R. pp. 110-114) and July 14, 1967 (R. pp. 140-142), denying petitioner's request for waiver of Section 74.1103(e) of the Commission's rules dealing with the regulation of community antenna television systems, and denying reconsideration thereof. Because

petitioner's statement of the case is incomplete, it is believed the Court would be assisted by a counterstatement.

COUNTERSTATEMENT OF THE CASE

1. Background

A. The National Television Allocations Structure.

The Commission is charged with the duty of executing the policy of the Communications Act to "make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service" (47 U.S.C. 151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)). The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). In addition, the Act authorizes the Commission "to establish areas and zones to be served by any station" (47 U.S.C. 303(h)). In the television field, the Commission has sought to fulfill these responsibilities on a nationwide basis through the table of assignments contained in Section 73.606 of the rules (47 CFR 73.606). Its power to establish such an assignment plan was upheld by the Court of Appeals, Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (C.A.D.C. 1954).

The table of assignments is predicated upon the social desirability of having a large number of local outlets with diversity

of control over disseminating sources rather than a few stations serving vast areas and populations. In the Sixth Report and Order, wherein the assignment plan was adopted, 17 F.R. 3905 (1952), the Commission rejected proposals premised on the theory that channel assignments should be clustered in major population centers with smaller communities obtaining reception service solely from the larger cities rather than attempting to support a station with their own less substantial economic resources. The Commission stated (Sixth Report and Order, par. 79):

The Commission, on the other hand, believes that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs.

Thus, our commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets.

B. The Impact of Community Antenna Television Systems.

Community antenna television systems (commonly called ^{1/}CATV systems) originated as a supplementary service to improve

^{1/} The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." 47 CFR 74.1101(a).

reception of local television stations in areas having unfavorable reception characteristics, and to extend the signals of the nearest television stations into remote or underserved areas. These initial systems were generally successful and larger interests were thereafter attracted to CATV as a commercial venture. Channel capacity on the systems increased correspondingly from three to five to twelve channels and now a twenty channel capacity is being projected for systems in the near future. At the same time the number of CATV systems has mushroomed to more than 1,600 while the distance which signals are taken has increased to as much as 600 miles.

Because of the tremendous growth of the CATV industry, the Commission has been concerned for some time whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities,^{2/} might not adversely affect the maintenance and development of the basic "free" system of television broadcasting.

The basis of this concern is that the television stations which have been established pursuant to the foregoing allocation scheme depend almost entirely on advertising revenues for income. Since the amount of revenue a station receives is related to the size of its audience, a significant reduction in the number of viewers will result in a decline in revenues. This may adversely affect the service being rendered and may even cause a station to

^{2/} It is not economically feasible to extend CATV service to sparsely populated outlying areas.

leave the air. By the same token unfavorable competitive conditions may inhibit the establishment of new services.

For nearly a decade the Commission has recognized that CATV systems operating in the service area of broadcast stations can have an adverse economic impact on those stations. CATV and TV Repeater Services, 26 F.C.C. 403, 421-422 (1959). The so-called Carter Mountain case provides a classic example. There, after an evidentiary hearing, the Commission found that the amount of local revenue received by station KWRB-TV, Riverton, Wyoming, from each of the major towns in its market areas was inversely proportional to the ratio of CATV subscribers to total TV homes in each town. On the basis of this and other facts as to KWRB-TV's condition as a small market station, the Commission found that the unconditional grant of an application for microwave service -- which would result in substantially improved reception of distant signals -- would probably also result in the station's demise. Accordingly, it denied the application to construct the microwave system, stating, however, that favorable action would be forthcoming if the CATV carried the local station's programs and refrained from duplicating over its system the programs carried by the local station. Upon review, the Court of Appeals held that the record "amply" supported this conclusion, noting also that the conditions specified by the Commission were entirely reasonable limitations under the public interest standard of the Communications Act. Carter Mountain Transmission Corp., 32 FCC 459, affirmed, Carter Mountain Transmission Corp. v. Federal Communications Commis-

sion, 321 F.2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963).

Beginning in 1962, the Commission instituted a series of rulemaking proceedings looking toward the regulation of CATV.^{3/} These proceedings led to the adoption of the First Report and Order, 30 F.R. 6038, 38 F.C.C. 683, in 1965, and the adoption of the Second Report and Order, 31 F.R. 4540, 2 F.C.C. 2d 725, in 1966. In these proceedings the Commission carefully considered the emerging CATV industry and found that CATV is a valuable supplemental service, bringing television to areas beyond the range of broadcast stations and providing a choice of services in areas where for one reason or another only one or two signals can be received. On the other hand, it concluded that the impact on present and prospective broadcast services may be adverse and that CATVs have an unfair competitive advantage over such services which could significantly and adversely affect the public interest. Accordingly, the Commission adopted a rule requiring CATV systems to carry all local stations within whose grade B service area^{4/} the system is located, and, with certain limitations, to provide nonduplication protection to the

^{3/} Notice of Proposed Rule Making, Docket No. 14895, Fed. Reg. 12586 (1962); Further Notice of Proposed Rule Making, Docket No. 14895, and Notice of Proposed Rule Making, Docket No. 15233, 28 Fed. Reg. 13789 (1963); Notice of Inquiry and Notice of Proposed Rule Making, Docket No. 15971, 30 Fed. Reg. 6078 (1965).

^{4/} The Grade B service area circumscribes the area within which viewers in at least 50 per cent of the locations will receive a viewable picture at least 90 per cent of the time. See Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 515-16 n. 12 (D.C. Cir. 1955). A distant station is one whose predicted Grade B contour does not include the community of the CATV. See Section 74.1105 of the rules.

local stations. Only the nonduplication rule is involved in this proceeding.^{5/}

The Nonduplication Rule - The Commission found that in the nature of things the competition between CATV and the broadcaster was not inherently fair, 2 F.C.C. 2d at 778-779. A television station normally obtains the right to exhibit nonnetwork programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within the same period of time obviously reduces the audience and the value of the program to the station. The amount and kind of exclusivity that can be created is restricted by the antitrust laws, but those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process. This exclusivity is further recognized and maintained through the operation of Section 325 of the Communications Act, 47 U.S.C. 325, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

CATV systems presently stand outside this distribution process. They do not compete for network affiliation, nor for access to syndicated programs, feature films, or sports events.

^{5/} Section 74.1103 and other sections of the CATV rules are appended to petitioner's brief.

They are not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier -- although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product -- the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

In the Commission's view, the carriage, from a distant station, of the same program being shown by the local facility represents a mode of competition that is inherently unfair and against the public interest. Its opinion stated (38 F.C.C. at 706)

We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in

the parent industry's competitive program market -- to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signal it carries.

The nonduplication rule carries out this policy. It simply requires that when the same program is being broadcast on the same day by two or more stations whose signals are received by the system, preference must be given the local station through the deletion of the more distant station's signal.

This nonduplication protection applies to "prime time" network programs (i.e., those presented by the network between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Furthermore, a local station is only entitled to nonduplication protection on a cable system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *^{6/}" Section 74.1103(e). Finally, the CATV system need not delete reception of a network program if, in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program. Section 74.1103(g).

As to both the carriage and nonduplication rules, the Commission found that economic impact considerations supported the rules. Taking into account CATV's explosive growth, the

^{6/} Under the rule, television signals are divided into four priorities in terms of signal strength: (1) principal community, (2) Grade A, (3) Grade B, and (4) translator stations.

character of the markets entered, and the degree of penetration achieved, the agency found that CATV could have a substantial negative effect upon station revenues and audiences. It further found that the impact was likely to be more serious in the future than it had been in the past, 2 F.C.C. 2d at 737.

In recognition of the fact that individual stations may be faced with unusual problems, provision was made whereby a waiver of the rules could be requested under Section 74.1109. That section provides that the Commission may grant a waiver in whole or in part if it determines that the "public interest" would be served thereby. It also provides that the Commission may specify other procedures such as "oral argument" or an "evidentiary hearing" if it determines such procedures appropriate in considering the waiver request, Section 74.1109(f). Finally, the Commission stated that it would "continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local stations than do the Commission's rules." 2 F.C.C. 2d 746.

2. The Present Proceeding.

Pursuant to the new rules KVOS-TV, the only station in Bellingham, Washington, requested that petitioner discontinue the importation of programs from Seattle when KVOS-TV was carrying the same programs on its own station. Instead of honoring the request, petitioner asked the Commission to waive the rule, as it had the right to do under Section 74.1109. Petitioner's

systems serve Bellingham, Burlington, Mount Vernon, and Sedro Woolley, Washington. All are affected by the Commission's order here since they are within the local service area of KVOs-TV, Bellingham.

In support of its request for waiver, petitioner, essentially alleged that KVOs-TV's advertising revenues came mainly from Vancouver, Canada and therefore the carrying of Seattle stations on petitioner's system could not harm KVOs-TV economically. Furthermore petitioner alleged that Bellingham residents are culturally and economically tied to Seattle and not Vancouver. In a series of additional allegations, Total Telecable, alleged: (1) it should receive special consideration in its request for waiver because it originated community program services on its cable; (2) the Commission incorrectly asserted jurisdiction over CATV; (3) CATV does not amount to "unfair competition"; (4) the nonduplication rule amounts to an infringement upon petitioner's First Amendment rights; (5) a hearing should be held before §74.1103(e) is applied; and (6) in light of the copyright decision in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, the local station should indemnify petitioner for its potential copyright liability in providing the television station with exclusivity, or at least, pay petitioner's costs in implementing the exclusivity rule.

KVOs-TV, Bellingham, opposed the waiver request. It pointed out that although some of its revenue is derived from Canada, the station, as shown by the programming described in its renewal

application, served the needs and interests of its United States viewing public. KVOS-TV further stated that its network affiliation is derived from the existence of its viewing audience in the United States and that the network hourly rate is based upon the size of its United States audience.

In dismissing petitioner's waiver request, the Commission pointed to its holding in the rule making proceeding, Second Report and Order, 2 F.C.C. 2d at 736, that the nonduplication requirement rests on two basic grounds: (1) that duplication of a local station's programs is an unfair competitive practice and is inconsistent with the supplementary role of CATVs in providing service to the public and (2) that nonduplication is necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service both existing and potential. It found that petitioner's allegations that station KVOS-TV received much of its advertising revenues from Canada and that petitioner originated public service programming of its own were largely irrelevant to the question of waiving the rules, and that petitioner had failed to show a basis for the special relief it sought.

The Commission reiterated its belief "that same-day program exclusivity would not have an unduly disruptive effect on CATV service," and concluded that Total Telecable had failed "to point to any special circumstances which would warrant a departure from this view." Although petitioner had asked for a hearing the

Commission noted the "threshold factual allegations do not persuade us that a hearing is necessary."

On April 21, 1967, Total Telecable filed a Petition for Reconsideration. Reconsideration was sought because, petitioner argued, the Commission "accorded insufficient weight" to its claim that KVO5-TV relied on Vancouver, Canada for its revenues, and petitioner had not been given the same procedural protection that would be given to a broadcast licensee.

The Commission rejected petitioner's first argument "on the ground that the reasons underlying the program exclusivity requirement, as stated in the Second Report and Order, do not rely on such considerations as the location of the major portion of a television station's audience or revenue sources." As to the need for a hearing, it pointed out that its rules provided for hearings where they appear justified -- "but petitioner's arguments have not persuaded us that a hearing is required in its case. United States v. Storer Broadcasting Company, 351 U.S. 192."

This appeal followed. On September 7, 1967, the Court denied petitioner's request for a stay of the Commission's orders, but later provided for expedited consideration of the merits.

QUESTIONS PRESENTED

In the view of respondents the following questions are presented:

1. Whether the Communications Act gives the Commission the authority it has asserted over community antenna television systems.
2. Whether the Commission properly declined to hold a hearing on petitioner's request that it be exempted from the obligation to comply with the nonduplication rule.
3. Whether the nonduplication rule unconstitutionally restricts petitioner's right of free speech.

SUMMARY OF ARGUMENT

The Commission has exercised limited jurisdiction over CATV systems to insure that they will be of value as a supplement to the television broadcast service whose signals they use, without destroying the basic allocation scheme of "free" television service. CATV systems are engaged in communication by wire in interstate commerce, to which the Communications Act is specifically made applicable. They are also a practical extension of the service of television stations. We submit that the holding of Regents v. Carroll, 338 U.S. 586 (1950), relied upon by petitioner as dispositive of the jurisdictional question, is limited to the factual situation presented there and that Regents does not resolve the question of the Commission's jurisdiction over an entity engaged in interstate communication by wire.

Since the Commission has the authority to make all rules

necessary to the execution of its functions, National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and to carry out the provisions of the Communications Act it could provide by rule for non-duplication protection and the proper procedure for waiver. In this case, the petitioner's obligation to comply with the provisions of Section 74.1103, 47 CFR 74.1103, is rooted in the promulgation of the rule in a valid rule making proceeding. Petitioner had every opportunity to participate in this proceeding; it was not entitled to a hearing nor was it deprived of any constitutional rights of due process of law.

Petitioner sought waiver of a rule which represents a settled determination of where the public interest lies. Its waiver request simply failed to set forth reasons, sufficient if true, to override the policy decisions underlying the promulgation of the nonduplication rule.

Finally, the Commission's rules do not violate the constitutional protection of free speech. Rather, they constitute a reasonable regulation of the use by CATV systems of radio signals.

ARGUMENT

I. THE COMMUNICATIONS ACT GIVES THE COMMISSION THE AUTHORITY IT HAS ASSERTED OVER COMMUNITY ANTENNA TELEVISION SYSTEMS.

Petitioner's chief contention is that the Commission has no jurisdiction over CATV systems. Its argument relies in particular on this Court's holding in Southwestern Cable Co. v. United States, 378 F.2d 118 (1967), ^{7/} that the Commission's authority "was exercisable only against licensees or applicants." Since CATVs fall in neither category, the Court set aside a Commission order limiting the expansion of CATV systems in San Diego pending a hearing before the agency. In reaching its decision, the Court relied largely on language in Regents v. Carroll, 338 U.S. 586 (1950), wherein the Supreme Court observed that the Commission's "powers center around the grant of licenses."

More recently, the Court of Appeals for the District of Columbia Circuit upheld the Commission's jurisdiction over CATV. Buckeye Cablevision, Inc. v. Federal Communications Commission, ___ F.2d ___, decided June 30, 1967. The Court concluded that CATV, "as a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme" is subject to Commission authority.

We have requested the Supreme Court to review the Southwestern decision, contending that it erroneously decides a new

^{7/} Earlier in this proceeding, petitioner took the position that Southwestern did not decide the jurisdictional question. See Motion for Accelerated Review filed on September 15, 1967.

and important question of law and that it is in conflict with the decision of another circuit.^{8/} In this brief we attempt to show that the Regents case is not dispositive of the jurisdictional question and that the Communications Act, as the Court in Buckeye found, confers on the Commission the power to regulate CATVs.

- A. Regents v. Carroll, Which Involved A Contractual Dispute Between A Broadcast Licensee And A Third Party, Does Not Resolve The Question Of The Commission's Jurisdiction Over An Entity Engaged In Interstate Communication By Wire, An Activity Expressly Subject To The Commission's Regulatory Authority.

In its Southwestern opinion, this Court stated that its decision was guided by the language of the Supreme Court in Regents v. Carroll, that "the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license that the Commission may apply to enforce its decisions" 338 U.S. at 597-599. In that case the Commission granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the Commission had invalidated the contract.

^{8/} If the Supreme Court should grant our petition for certiorari, it is our view that this proceeding should be held in abeyance pending a decision on the merits. Such decision would presumably resolve the principal issue here and might render the entire proceeding moot.

The issue in the case was stated thusly by the Court: "whether in the light of the Supremacy Clause of the Constitution a state may enter a judgment that grants respondents a recovery on the very stock purchase contract that justified the Commission's refusal of a license." As it had on earlier occasions,^{9/} the Court noted that the Communications Act does not give the Commission the authority to adjudicate private controversies. It found that the Commission had no power to "act as a bankruptcy court" or to determine the validity of contracts between licensees and others. Id. 602. And accordingly it concluded that the state court's judgment did not contravene the Supremacy Clause.

It is in this context that the discussion of the Commission's powers took place. Unlike CATVs, the other party to the contract in Regents was not a person engaged in interstate communication by wire and radio. As we show in the following section of our brief, the Act applies to all such communications and the Commission was expressly created to regulate such activity. For this reason we respectfully urge that Regents v. Carroll is not controlling, and that the better view of that case is the one taken by the District of Columbia Circuit in Buckeye:

In Carroll, the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III "centered" around its licensing power which does not encompass abridgment of contracts between licensees and third parties. But the Court's view of this limitation was based largely on

^{9/} See e.g., Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138.

the agency's lack of authority at the time to issue cease-and-desist orders, against licensees or anyone else, to prevent violations of the Act. Subsequently Congress conferred such authority, [47 U.S.C. 312(b)(c)] which correspondingly expanded the Commission's power to protect the regulatory scheme. We do not have to decide the degree to which Carroll may still be viable since we think that in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire scheme. [Footnote omitted.]

The CATV industry is indisputably part of the nation's communications system. This is a field in which Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation." It did so because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," National Broadcasting Co. v. United States, 319 U.S. 190, 219, 220 (1943).

Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), Philadelphia Broadcasting Co. v. Federal Communications Commission, 359 F.2d 282, 284 (C.A.D.C. 1966).

To hold that Regents v. Carroll is dispositive of the jurisdictional question is in one view to read that case too broadly. In the following section of our brief we discuss those sections of the Communications Act on which the Commission relies for its claimed jurisdiction and which were accepted by the District of Columbia Circuit.^{10/} We believe that construed in light of National Broadcasting Co. and Pottsville, supra, these statutory provisions confer on the agency the jurisdiction asserted.

B. Since CATV Systems Are Engaged In Interstate Communication By Wire Or Radio, They Fall Within The Ambit Of The Commission's Regulatory Authority.

The Communications Act directs the Commission to provide "a rapid, efficient, Nation-wide and worldwide wire and radio communication service * * *," 47 U.S.C. §151. It applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or transmission of energy by radio. * * *" 47 U.S.C. §152. To achieve the goals of the Act, the Commission is directed inter alia, to establish "areas or zones to be served by any [broadcast] station," 47 U.S.C. §303(h), to issue broadcast licenses to "provide a fair, efficient, and equitable distribution of radio service" to the states and communities of the United States, 47 U.S.C. §307(b), and to promulgate rules and regulations to effectuate its responsibilities, 47 U.S.C. §§154(i), 303(f), (r).

^{10/} A fuller discussion of the authorities supporting the Commission's assertion of jurisdiction is appended to the Second Report and Order, 2 F.C.C. 2d at 793-797.

Under Section 3(a) of the Act, 47 U.S.C. §153(a), wire communication is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." In light of the service offered, it is clear that CATVs are engaged in communication by wire within the meaning of the Act. And see also 47 U.S.C. 153(b) which defines a "radio communication" as "the transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission."

It is clear also that CATVs engage in interstate transmissions under Section 3(e). This is so because the transmission of a television station is in interstate commerce, Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933); Fisher's Blend Station, Inc. v. State Tax Commission, 297 U.S. 650 (1936). And the extension of such an interstate communication by a CATV is part of the interstate transmission, even though the extension itself be entirely within one State. Buckeye Cablevision, Inc. v. Federal Communications Commission, supra; Idaho Microwave, Inc. v. Federal Communications Commission, 352 F.2d 729 (C.A.D.C. 1965); Ward v. Northern Ohio Telephone Co., 300 F.2d 816 (C.A. 6, 1962), cert. den., 371 U.S. 820.

Petitioner argues that the Commission's view of CATV as a link in the transmission of television signals to the public is fundamentally wrong and that CATVs, instead, are merely devices for the reception of signals, differing in no significant way from ordinary home antennas. But, in fact, CATVs are substantially more than passive receivers; they are elaborate distribution systems whereby signals may be carried hundreds of miles beyond their point of origin and delivered to subscribers far beyond the normal range or service area of the stations involved.

The argument that CATV systems are simply "master antennas" was considered by the Commission in its CATV rule making proceeding and found to be at odds with any realistic assessment^{11/} of the actual functions of a CATV system. This finding is in accord with court holdings in which the question has been considered. Thus in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (D.C.S.D. N.Y. 1966), affirmed, Fortnightly v. United Artists, 377 F.2d 872 (C.A. 2, 1967),

^{11/} There the Commission stated, 2 F.C.C. 2d at 780:

A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signal.

an action for infringement of copyright, the Court stated:

The term "community antenna," as used by defendants for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs--operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas. 255 F. Supp. at 180.

Likewise, the Court of Appeals in the Buckeye case described the system there as one which "receives programs which originate outside the state and retransmits them by cable to its customers" (Slip Op. ^{12/} p. 8, emphasis added.)

Thus, in practical effect as well as in legal contemplation, CATV systems are a part of the transmission of the television signal to the public. This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States,

^{12/} See also Idaho Microwave, Inc. v. Federal Communications Commission, supra, and Clarksburg Publishing Co. v. Federal Communications Commission, 225 F.2d 511, 517 (C.A.D.C. 1955).

319 U.S. 190, 217 (1943), the Commission clearly has the authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the Congressional scheme of television regulation, in particular the mandate of sections 307(b) and 303(s).^{13/}

Petitioner contends that the Commission has two principal and separate functions--to regulate communications common carriers and to license radio stations--and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate. The Communications Act expressly states that its provisions "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * *," 47 U.S.C. §152(a). Congress did not provide that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to imply such an intent. If

^{13/} This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals. Enacted in 1962, it represents clear Congressional approval of the policy decisions underlying the Table of Allocations, 47 CFR 73.606, adopted by the Commission to fulfill the mandate of Section 307(b). See H. Rept. No. 1559, 87th Cong., 2d, p. 3 (1962). Its relation to the CATV policy adopted by the Commission is set forth in the Notice and Second Report

Congress had meant only wire communication by common carriers, it would not have referred to "all" interstate communications.

Moreover, Congress stated in Section 1 of the Act, 47 U.S.C. 151, that its intent was not only to "centralize authority heretofore granted" to other agencies but also to grant "additional authority with respect to interstate commerce in wire and radio communication." This change in the law was for the purpose of "securing a more effective execution" of national communications policy. Thus the avowed intendment of the Act as expressly stated in Section 1 negates petitioner's argument that the only accomplishment of the legislation was to consolidate the common carrier functions of the Interstate Commerce Commission and the licensing function of the Federal Radio Commission. Under the circumstances, petitioner's resort to legislative history^{14/} to establish a different view is not only unnecessary but improper. United States v. Missouri Pac. R. Co., 278 U.S. 269 (1929); Elm City Broadcasting Co. v. United States, 235 F.2d 811 (C.A.D.C. 1956).

But even if the statute were not so clear, the legislative history on which petitioner relies is not persuasive. While it is true that the Senate version of the Communications Act would have divided the new Commission into divisions, the Radio Division and the Telephone and Telegraph Division, the House Committee rejected this approach because these divisions would function

^{14/} Total Telecable's Br. pp. 23-25.

practically as separate Commissions without their action being subject to review by the full Commission. H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2 (1934). The bill as finally enacted did not include this sharp functional division of the Commission's powers. Instead, the Act is a comprehensive scheme for the regulation of interstate communication and constituted "the response to a Presidential message calling to the attention of Congress the disjointed exercise of federal authority over the forms of communication. The primary purpose of the Act was to create a commission 'to regulate all forms of communication * * *'" H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3.355 H.S. at 104 n. 14. The legislative history, like the language of the Act itself, demonstrates that Congress intended not merely to effect a reshuffling of two regulatory activities to place them under one authority for administrative purposes, but rather, to establish a cohesiveness and uniformity in the handling of all interstate communications matters which had until that time been lacking.

In affirming the Commission's jurisdiction over CATVs, the Court of Appeals for the District of Columbia relied on the expressed objectives of the Communications Act and the specific mandate given therein to the Commission. In addition, it acknowledged the soundness of the Commission's conclusion that further unregulated growth of CATV represents a substantial economic threat to licensed television stations and to the allocations system established by the Commission. And finally it pointed

to the substantial body of case law, both in the communications field and in other areas, which recognizes the implied authority of the expert agency to deal with aligned activities affecting the regulatory scheme and grants to it sufficient latitude to cope with new developments in the industry it was established to regulate.^{15/} The Southwestern opinion did not address itself to any of these considerations since the Court in that case felt that Regents v. Carroll was dispositive. We respectfully urge that with due regard for the language in that case the weight of authority, both statutory and judicial, supports the Commission's assertion of jurisdiction.

^{15/} See e.g., National Broadcasting Co. v. United States, *supra*; American Trucking Assoc. v. United States, 344 U.S. 298 (1953); Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F.2d 153 (C.A.D.C. 1967).

II. THE COMMISSION PROPERLY DECLINED TO HOLD A HEARING ON PETITIONER'S REQUEST THAT IT BE EXEMPTED FROM THE OBLIGATION TO COMPLY WITH THE NONDUPLICATION RULE.

Petitioner argues (Br. pp. 41-45) that it was entitled to a hearing before its long standing business practices were modified and that it had presented substantial and material questions of fact in its petition for waiver. We believe petitioner errs on both counts. But before addressing ourselves specifically to these contentions we think it useful to define at the outset the scope of the Commission's order.

The order is not, as petitioner argues, a "cease and desist order" under Section 312 of the Communications Act, 47 U.S.C. 312. Pursuant to that section, the Commission may issue such orders to any person failing "to observe any rule or regulation of the Commission" authorized under the Act. They may be entered only after a hearing in which the person involved has been afforded an opportunity to show cause why the order should not be issued. And the proceedings are reviewable only in the Court of Appeals for the District of Columbia Circuit, 47 U.S.C. 402(b) (7). ^{16/}

Here the Commission did not purport to act under Section 312, nor would it have been appropriate to do so since no violation of the rule had yet occurred. ^{17/} It simply had before it a petition

16/ Buckeye Cablevision, Inc. v. Federal Communications Commission supra, involves review of such an order.

17/ The nonduplication rule generally becomes operative when the local station requests exclusivity from the cable operator. However, upon receipt of this request, the CATV system may petition the Commission to waive the rule. A petition for waiver operates to stay compliance pending a determination of the merits of the waiver petition. Hence, the necessity for including a clause fixing the date for compliance in any order denying a petition for waiver.

for waiver of one of its rules filed by petitioner.

The waiver procedure is set forth in considerable detail in Section 74.1109 of the rules and the Commission's action was taken pursuant to and in accordance with the procedures specified therein. See also 5 U.S.C. 555(d), which provides that prompt notice with "a simple statement of . . . grounds" shall be given with respect to the denial of any petition.

While the Commission's order contained a clause directing petitioner to comply with the rule within thirty days, that clause was inserted only to give petitioner notice of a date certain when it would be expected to be in compliance with the rule;^{18/} aside from this the ordering clause added nothing to the obligation imposed on petitioner. Once its request for special relief was denied, it was the rule itself, adopted after proceedings in which petitioner had a full opportunity to participate, that compelled the conduct at issue here.

As to the impact of this ruling on petitioner's systems, each of these systems has a twelve channel capacity and currently receives signals from ten stations (four from Seattle, three from Tacoma, two from Vancouver, Canada, and the Bellingham Station). In addition, petitioner itself originates some programming for carriage on the other channels. Under the rules, petitioner may continue carrying nine of the ten stations as it has always done. The Commission's order requires only that petitioner refrain from^{19/} showing during prime time the programs of Seattle station KIRO-TV

^{18/} In its form the order is typical of Commission orders denying similar waiver requests. See Lee County TV Cable Company, 5 F.C.C. 2d 707 (1966); Consolidated TV Cable Service, 7 F.C.C. 2d 886 (1967); Mountain State Cable, Inc. 8 F.C.C. 2d 315 (1967); and Douglas Antenna Cable TV, 8 F.C.C. 2d 317 (1967).

when those programs are also being carried that day on the local Bellingham station. In other words, petitioner's subscribers are being denied not a single program they have been receiving. Under the circumstances we submit that petitioner's repeated assertions that a long-established business faces ruin as a result of the Commission's action are gross exaggerations bearing no relation to the actual facts and that, on the contrary, the effect of the Commission's action is clearly minimal insofar as petitioner's enterprise is concerned.

We turn now to petitioner's claim that an evidentiary hearing should have been held, considering first the contention that a hearing is required by statute before changes in an existing operation can be affected; secondly, that without a hearing the rules violate due process requirements; and finally that a hearing should have been held on the request for waiver.

A. Where General Rules Applicable To A Broad Class Of Persons Are Adopted In Accordance With Prescribed Rule Making Procedures, The Commission Is Not Required By Statute To Hold Separate Adjudicatory Hearings Before The Rules Can Become Effective.

As we have detailed in our counterstatement, the non-duplication rule was originally adopted in a rulemaking proceeding in which all interested parties were permitted to participate. See First Report and Order, 30 F.R. 6038, 38 F.C.C. 683 (1965) in which the rule was restricted to microwave fed CATV systems. After further proceedings in which notice and opportunity to comment were given to interested parties, the rule was extended to cover both

microwave and off the air CATV systems, but was reduced in its operation from a 15 day duplication ban, to a prohibition of duplication within a 24 hour period. Second Report and Order, 31 F.R. 4540, 2 F.C.C. 2d 725 (1966). Petitioner alleges no procedural irregularities with respect to the rule making and the Court of Appeals for the District of Columbia Circuit has expressly held that the proceeding was conducted in accordance with the Administrative Procedure Act. Buckeye Cablevision, Inc. v. Federal Communications Commission, supra.

Petitioner's argument that further proceedings are necessary because the rules modify long-standing business practices is not persuasive. Most rules do require a change in existing practices of the affected parties, see e.g. National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Metropolitan Television Co. v. Federal Communications Commission, 289 F.2d 874 (C.A.D.C., 1961). But the applicable statute, 5 U.S.C. 553(c), provides that in the normal course such rules may become effective thirty days after publication. The cases cited by petitioner, Civil Aeronautics Board v. Delta Air Lines, 367 U.S. 316 (1961), and Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (C.A.D.C., 1949), are not to the contrary. Delta arose in the context of a licensing situation and did not involve a rule at all; the case turned solely on the question of the Board's power to alter a carrier's certificate after it had been issued and become effective but while petitions for reconsideration were pending. Likewise, Standard

concerned an individual licensing action in which the Board without notice or hearing suspended the registration of an air carrier. Neither case concerned in any way the power of an agency without adjudicatory proceedings to adopt and effectuate rules applicable to a broad class of persons. In cases raising such an issue the courts have invariably sustained the agency's authority even where existing statutes afforded individual parties a hearing before existing rights could be changed.

Thus, in American Airlines v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 843, the Civil Aeronautics Board promulgated a new regulation which denied without individual adjudicatory hearings, certain freight rights previously available to many carriers under their then outstanding certificates. The court held, however, that since the regulation was legitimately general in effect, and adopted in a fully adequate rule making, it could be applied so as to deprive outstanding certificate holders of pre-existing rights, even though the Federal Aviation Act (49 U.S.C. section 1371(g)) provided that outstanding certificates could not be modified without individual adjudicatory hearings.

This Circuit has recently applied the logic of American Airlines specifically to the radio licensing field. See California Citizens Band Assoc., Inc. v. United States, 375 F.2d 43 (9th Cir., 1967) cert. denied 36 US L Week 3130. In that case this Court held that midterm changes of existing operating privileges were entirely legal.

notwithstanding section 316 of the Act. The court stated:

Similarly in the case before us it is apparent from a reading of the statute that its primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee. We therefore hold that the general rule making procedure followed by the Commission was not violative of section 316 of the Act. 20/ 375 F.2d at 52.

The situation here is similar to that approved in American Airlines and California Citizens Band. The obligation of petitioner to comply with the provisions of section 74.1103 is rooted in the promulgation of the rule in a valid rulemaking proceeding. Accordingly, all of the statutory references in petitioner's argument (Br. pp. 41-45) to adjudicatory rights are inappropriate because they are addressed to situations in which individual licensees are, in effect, singled out for unique treatment. Here, on the contrary, the rule applies to all CATV systems coming within its terms.

20/ See also Federal Power Commission v. Texaco, 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Airline Pilots Association, International v. Quesada, 276 F.2d 892 (C.A. 2, 1960).

B. Denial Of A Hearing Did Not Deprive Petitioner
Of Due Process Of Law, Nor Is It A Taking Of Property.

Petitioner argues (Br., pp. 28-31) that aside from statutory requirements denial of a hearing in this case deprived it of due process of law since the issuance of the order to comply with the rules will deprive petitioner of the full use of its property.

As we have discussed above, the nonduplication rule is designed to carry out the valid objective of imposing upon CATV systems that degree of regulation which will insure that CATV service will be of maximum benefit in distributing television signals to the American public without destroying the basic television service which gives them their substance. Petitioner's argument as to deprivation of property was disposed of as long ago as 1932 in connection with the functions of the Radio Commission. At that time in Trinity Methodist Church South v. Federal Radio Commission, 62 F 2d 850, 852 (C.A.D.C. 1932), cert den 288 U.S. 599, the Court, citing Chicago B. & Q. R. Co. v. Illinois, 200 U.S. 561, 593, stated:

If the injury complained of is only incidental to the legitimate exercise of governmental powers for public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury does not attach under the Constitution.

. . . .

When Congress imposes restrictions in a field falling within the scope of its legislative authority and a taking of property without compensation is alleged, the test is whether restrictive measures are reasonably adapted to secure the purposes and objects

of regulation. If this test is satisfied, then "the enforcement of uncompensated obedience" to such regulation "is not unconstitutional taking of property without compensation or without due process of law" Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558. Cf. Reinman v. Little Rock, 237 U.S. 171 (1915); Hadacheck v. Los Angeles, 239 U.S. 394 (1915).

And as the Supreme Court stated in Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 282 (1933):

* * * This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises.

Thus, assuming that the Commission's promulgation of its CATV rules was a proper exercise of its statutory authority, their operation does not invade those rights of petitioners protected by Constitutional guarantees.

Petitioner argues (Br. 41-45) that it was entitled to a hearing before it could be deprived of any use of its property. However, the law is well settled that individuals subject to governmental regulation may constitutionally be deprived of certain property rights without an individual adjudicatory hearing where the deprivation is the result of a valid rulemaking proceeding. In Airline Pilots Association, Int'l v. Quesada, 276 F.2d 892 (2nd Cir., 1960), the court was faced with an argument similar

to that made here. In that case the Federal Aviation administrator had promulgated after a rulemaking only, a new rule barring individuals over 60 years old from serving as pilots. Many pilots were thereby deprived not only of a portion of their business investment, but rather of their basic livelihood. Said the Court:

Nor does the regulation violate due process because it modified pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. * * * Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicatory hearings including appeals to the courts, and each pilot whose license was affected -- here some 18,000-- might demand to be heard individually. 276 F.2d at 896.

Since petitioner had every procedural opportunity to which it was entitled in a valid rulemaking proceeding, it was not deprived of any constitutional rights of due process of law.

Bi-Metallic Investment Co. v. State Board, 239 U.S. 441, 445 (1915); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949), cert. denied 338 U.S. 860.

C. Since Petitioner's Request For A Waiver Did Not Set Forth Allegations Sufficient If True To Warrant An Exemption, No Hearing Was Required.

Petitioner next argues that aside from whether a hearing was required before the rules could be implemented, it was entitled to a hearing on its request for waiver (Br. pp. 45-49, 51-53). In United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the Supreme Court upheld the Commission's refusal to accept an application requesting facilities which the Commission had already determined in a rule making were not available. In so doing, the Court indicated what function the waiver route should play in situations in which the action requested by the applicant is plainly interdicted by the rules:

As the Commission has promulgated its rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for hearing. 351 U.S. 192, at 205.

See also Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964). Section 74.1109(c)(1), 47 CFR 74.1109(c)(1), providing for a waiver, specifies that the showing must be substantial:

The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

In a recent CATV case involving waiver of a section of the rules (not involved here), which required hearings before certain signals could be carried by CATVs, the District of Columbia Court of Appeals has observed that waiver petitions must meet a high evidentiary standard: "We do suggest, however, that in the emerging field of CATV, with respect to petitions for waiver of evidentiary hearings, the Commission should require greater factual specificity in petitions for waiver and in the proof" Channel 9 Syracuse, Inc. v. Federal Communications Commission, D.C. Cir., Case No. 20,843, decided September 26, 1967, Slip Op., p. 12. And see Cedar Rapids Television Co. v. Federal Communications Commission, D.C. Cir., Case No. 20,783, decided September 27, 1967, Slip Op., p. 7. In the present case, we note, waiver is being sought not of a hearing requirement, but of a rule which represents a settled determination as to where the public interest lies.

Measured against these standards the request for waiver made by petitioner was entirely inadequate. It simply failed to set forth reasons, sufficient if true, to override the policy decisions underlying the promulgation of the nonduplication rule. Thus, petitioner argues in its brief (pp. 46-47) that (1) the local station would not be hurt since it derived much of its revenue from communities in Canada where petitioner's systems do not operate; (2) that the non-duplication rule would be disruptive and result in a loss of business; and (3) that its own local service was more in the public interest. Its brief, like its petition

for waiver, sets forth nothing more than a bare assertion with respect to each of these and is hardly the kind of showing that would warrant departure from an important, carefully-considered substantive rule.

With respect to the merit of petitioner's own program originations, the Commission's action in no way precludes or inhibits whatever petitioner has been doing in this regard. Thus, it is difficult to understand what purpose would be served by a hearing on this point. Moreover, this service is available only to subscribers who of course must pay a monthly charge. It is no substitute for a broadcast service which may be viewed free of charge by any member of the public in the area who possesses a television receiver.^{21/} Thus, a hearing to examine the manner in which the CATV's locally originated material serves the public interest is simply not relevant to the waiver issue.

Likewise, the allegation of disruption in the service provided is hardly consequential. As we have shown, the disruption here is minimal, involving only the requirement that the viewer turn his channel selector from KIRO-TV to KVOS-TV if he wishes to view a program formerly carried by both. The Commission was aware that

^{21/} In 1962 Congress underscored the nation's commitment to local broadcast service in enacting the so-called "all-channel receiver legislation, 47 U.S.C. 303(s). Among other things the purpose of the legislation was to "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." H. Rep. 1559, 87th Cong., 2d Sess. p. 3. See also 47 U.S.C. 307(b).

certain aspects of the rules would bring about significant changes in existing service and as to these, in order to avoid disruption, "grandfather" provisions were enacted exempting long established systems like petitioner's. ^{22/} See e.g., 2 F.C.C. 2d at 784-786. We submit, however, that it borders on the frivolous to argue that a hearing was needed to explore the impact of the changes required here. It is indeed difficult to imagine a situation where the impact of the rules on a system and its subscribers is less burdensome than is the case here.

The contention that an exemption was warranted because most of the television station's audience and advertising revenue derives from areas not served by the CATV is nothing more than an attempt to relitigate the questions decided in the rule making. ^{23/} Considering not only past and present situations but future trends as well, the Commission emphasized that it was the latter primarily which called for the adoption of the rules:

[W]e believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and

^{22/} Thus petitioner, having commenced operation prior to February 1, 1966, is not subject to Section 74.1107, the so-called distant signal rule.

^{23/} The petitioner's argument that Station KVOs-TV derives revenue from the viewing of its programs in Canada does not detract from its need for non-duplication protection. As KVOs-TV pointed out, KVOs-TV's viability as a local station providing for the public interest in Bellingham, Washington, depends upon its network affiliation and the network hourly rate for advertising, both of which are based upon its viewing audience in the United States. Thus any fragmentation of its United States audience directly affects its existence as a local station serving the Bellingham area.

potential. NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. . . . This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service. 38 F.C.C. 713-714.

Indeed it is frequently true that individual systems serving a limited number of subscribers pose no immediate threat to a station's viability. But it would be folly for the Commission to fragment the problem this way. Where, as the Commission found with respect to CATV, growth was occurring at a rapid rate and a potential for harm was shown, the fact that a particular system might show that its operation poses no immediate threat to an existing station is hardly sufficient to warrant an exemption. This is particularly so where the agency has concluded that duplication by a CATV of programs the local station has bargained for to obtain exclusivity rights is inherently unfair.

The adoption of the CATV rules was the culmination of a most intensive administrative study of the interrelation between

broadcasting and CATV service. Three separate quasi-legislative proceedings have been conducted^{25/} and experience and knowledge have been accumulated on a case to case basis as well.^{26/} The nature of the conflict and the considerations at stake were discussed in great detail in the opinions under review in this proceeding and have been outlined in the preceding paragraphs. The Commission has found that CATV is a valuable supplemental service, bringing television to areas beyond the range of broadcast stations and providing a choice of services in areas where for one reason or another only one or two signals can be received. On the other hand, it has concluded that the impact on present and prospective broadcast services may be adverse and that CATVs have an unfair competitive advantage over such services which could significantly and adversely affect the public interest. The rules strike a balance between the interests of the CATV system and the broadcast stations which at the same time serves the overriding public interest in the advancement of a nationwide broadcast service. To require that before they may be implemented, an ad hoc examination of the economics of each situation must be conducted at the request of an affected system would fatally impair the effectiveness of the rules.

25/ CATV and TV Repeater Services, supra; First Report and Order, supra; Second Report and Order, supra.

26/ Carter Mountain Transmission Corp., 32 F.C.C. 459 (1963); Black Hills Video Corp., 5 Pike and Fischer, RR 2d 612 (1965); Collier Electric Co., 2 Pike and Fischer, RR 2d 675 (1964).

III. THE NONDUPLICATION RULE DOES NOT
UNCONSTITUTIONALLY RESTRICT
PETITIONER'S RIGHT OF FREE SPEECH.

Total Telecable contends that the CATV rules infringe upon its right of free speech in contravention of Section 326^{27/} of the Communications Act and the First Amendment of the Constitution. Petitioner's argument is premised on the ground that Section 74.1103(e) inhibits the distribution of Constitutionally protected material. We believe it is clear that no such violation exists. In National Broadcasting Co. v. United States, 319 U.S. 192 (1943), the Supreme Court made clear that reasonable regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment.^{28/} That case sustained regulations adopted by the Commission to regulate the relationship between radio stations and networks. The Court took account of the chaos which orderly regulation had supplanted and found that, "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end, Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," and did so in such a manner as to "preclude the notion that the Commission is empowered to deal only with technical and

^{27/} Section 326 states ". . . no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

^{28/} See also California Citizens Band Assoc. v. United States, 375 F.2d 43 (9th Cir., 1967); Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2 C.A. 1965).

engineering impediments to the 'larger and more effective use of radio in the public interest.'" (319 U.S. at 217). The Court concluded that (319 U.S. at 227):

* * * The right of free speech does not include however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

If, as we urge, the Commission has been granted the authority by Congress to limit the duplication of local television signals through the importation of distant signals, the National Broadcasting Co. case makes clear that such a limitation raises no substantial free speech question. CATV systems constitute a part of the scheme of television distribution, which unlike any other modes of expression, make use of radio signals as a sine qua non of their operation. Thus in essence the CATV regulations, like the network rules at issue in the N.B.C. case, are another aspect of regulation of the use of the airwaves.

The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air wave in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon,

and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest.

Petitioner does not dispute the reasonableness of the nonduplication rule. Its free speech argument is devoted to a discussion in the abstract of cases involving wholly different media. With respect to the kind of regulations at issue here, however, the courts have consistently upheld their validity against challenges that First Amendment rights were being infringed. In the Carter Mountain case the court rejected the argument that nonduplication requirements constituted an improper restraint on free speech, stating that "protection of the public interest does not amount to 'censorship,'" 321 F.2d at 364. Similarly in Buckeye the court observed (Slip Op. pp. 8-9):

It is true that CATV systems disseminate programs carrying a wide range of information. But we think the restraint imposed by the rules is not more than is reasonably required to effectuate the public interest requirements of the Act.

It is important to point out, in conclusion, that the Commission's rules contain no restrictions of any sort on petitioners' right to originate their own programs. No expressions by petitioners are involved. Petitioners are restricted only in the use they make of signals broadcast by others. For this reason, Weaver v. Jordan, 49 Cal. Rep. 537, 411 P.2d 289 (1966), cert. den. 385 U.S. 844, is not in point. In that case, the Supreme Court of California struck

down, as inconsistent with the First Amendment, as absolute prohibition against the origination of programs by a wire Pay-TV system, and the Court emphasized that its holding was based upon the sweeping nature of the prohibition. That case is plainly distinguishable in view of the limited regulation embodied in the Commission's CATV rules.

In sum, the regulation of the air waves is an exercise of the commerce power. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 279 (1933) and Congress may subject their use to reasonable regulation in the public interest, whether the use of radio signals be made by radio and television stations or by CATV systems. Such regulation which, as we have shown above, is reasonably related to valid objectives, is not an infringement upon the rights of free speech of either the CATV system operator or the viewing public.

CONCLUSION

For the reasons stated, the Commission's action should be affirmed.

Respectfully submitted,

DONALD F. TURNER,
Assistant Attorney General,

HENRY GELLER,
General Counsel,

HOWARD E. SHAPIRO,
Attorney.

JOHN H. CONLIN,
Associate General Counsel,

EDWARD J. KUHLMANN,
Counsel.

Department of Justice
Washington, D. C. 20530

Federal Communications Commission
Washington, D. C. 20554

October 23, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward J. Kuhlmann

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

On Petition for Review of Orders of the
Federal Communications Commission

SUPPLEMENTAL BRIEF FOR PETITIONER

Of Counsel:

COLE, ZYLSTRA & RAYWID

2011 Eye Street, N.W.

Washington, D.C. 20006

JOHN P. COLE, JR.

ROGER E. ZYLSTRA

ALAN RAYWID

2011 Eye Street, N.W.

Washington, D.C. 20006

Attorneys for Petitioner

July 8, 1968

FILED
JUL 8 1968
WM. B. LUCK, CLERK

JUL 10 1968

PRELIMINARY STATEMENT	1
ARGUMENT.	2
I. F.C.C. Jurisdiction over CATV	2
II. Infringement upon Free Speech	4
III. Right to Hearing.	11
CONCLUSION	13

TABLE OF AUTHORITIES

Conley Electronics Corp. v. Federal Communications Commission, ____ Fed. ____, 12 R.R.2d 2108	7
Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. ____, 36 LW 4656	2,5,6,9
NBC v. United States, 319 U.S. 190	6
United States v. Southwestern Cable Co., 392 U.S. ____, 36 LW 4553	1,2,3,4,5, 9,10,11,12

STATUTES

Communications Act of 1934 47 U.S.C. §§	
303(r)	3
312	10,12
326	8

ADMINISTRATIVE RULES

F.C.C. Rules and Regulations 47 C.F.R. §§	
74.1101	5
74.1103	3,4,6,13
74.1105	11

MISCELLANEOUS

Letter from F.C.C. to National Commission on the Cause and Prevention of Violence FCC 68-622, Mimeo No. 16828, dated June 12, 1968.	8
---	---

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

On Petition for Review of Orders of the
Federal Communications Commission

SUPPLEMENTAL BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This review was submitted to the Court on November 10, 1967, but held in abeyance pending the Supreme Court's decision in United States v. Southwestern Cable Co.,

392 U.S. ___, 36 LW 4553 (No. 363, June 10, 1968). By order of the Court of June 24, 1968, leave was granted for supplemental briefs to discuss the impact on the pending review of the Supreme Court's decisions in both United States v. Southwestern Cable Co., 392 U.S. ___, 36 LW 4553 (No. 363, June 10, 1968) and Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. ___, 36 LW 4656 (No. 618, June 17, 1968). We review these decisions here.

ARGUMENT

I

In United States v. Southwestern Cable Co., supra., the Supreme Court squarely upheld the jurisdiction of the Federal Communications Commission to regulate CATV, whether off-the-air or microwave fed, under the Commission's plenary power to regulate communications by wire or radio. But in its broad jurisdictional affirmance the Court stressed that it was not passing upon or examining the CATV rules promulgated under this power (Id., at 4556):

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court.

Nor did the Court outline the limits or extent of the Commission's regulatory power over CATV. (Id., at 4559):

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law", as "public convenience, interest or necessity requires". 47 U.S.C. §303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

Thus, the issues before this Court in the instant review challenging the Commission's jurisdiction over CATV (Argument, part I) are moot. Remaining, however, are the specific challenges of the validity of the non-duplication rule, 47 C.F.R. §74.1103 (Argument, part II) and the absence of guarantees in the rules to provide for an evidentiary hearing before curtailing existing service under

Section 74.1109 of the rules (part II B and III). These challenges raise constitutional questions not before the Supreme Court, but raised here.^{1/} We examine below the Court's decision in the two cases insofar as they bear upon the constitutional questions at issue here.

II

The carriage and non-duplication rule, Section 74.1103, provides for carriage of local signals and same-day non-duplication of the local signals by distant signals also carried by the CATV system. We argue in Part II of our Brief that the Commission's order of non-duplication imposes a prior restraint upon the reception and distribution of information in violation of free speech guarantees of the First Amendment. Language in the Supreme Court's recent decisions confirms our factual analysis of the type of service provided by the CATV system. Broadcasting contents are "a principal source of information and entertainment" Southwestern, supra, at 4559. Television viewing is achieved by both broadcaster who transmits signals and viewers, who "by means of television sets and antennas that they themselves

^{1/}

In its conclusion the Supreme Court observed (Id., at 4560): "And there is no claim that its [the Commission's] procedure in this respect is in any way constitutionally infirm."

provide, receive the broadcasting signals and reconvert them into the visible images and audible sounds of the program." Fortnightly, supra, at 4658. The service provided by CATV in television is ordinarily a "simultaneous retransmission of communications" in a stream that is "essentially uninterrupted and properly indivisible." Southwestern, supra, at 4557.

Both decisions by the supreme Court recognize CATV operation as essentially receipt and distribution of program materials. Insofar as a "performance" under the Copyright Act is concerned, Fortnightly held that the CATV service more closely resembles the viewer's role than the broadcaster's (Id., at 4655-4659):

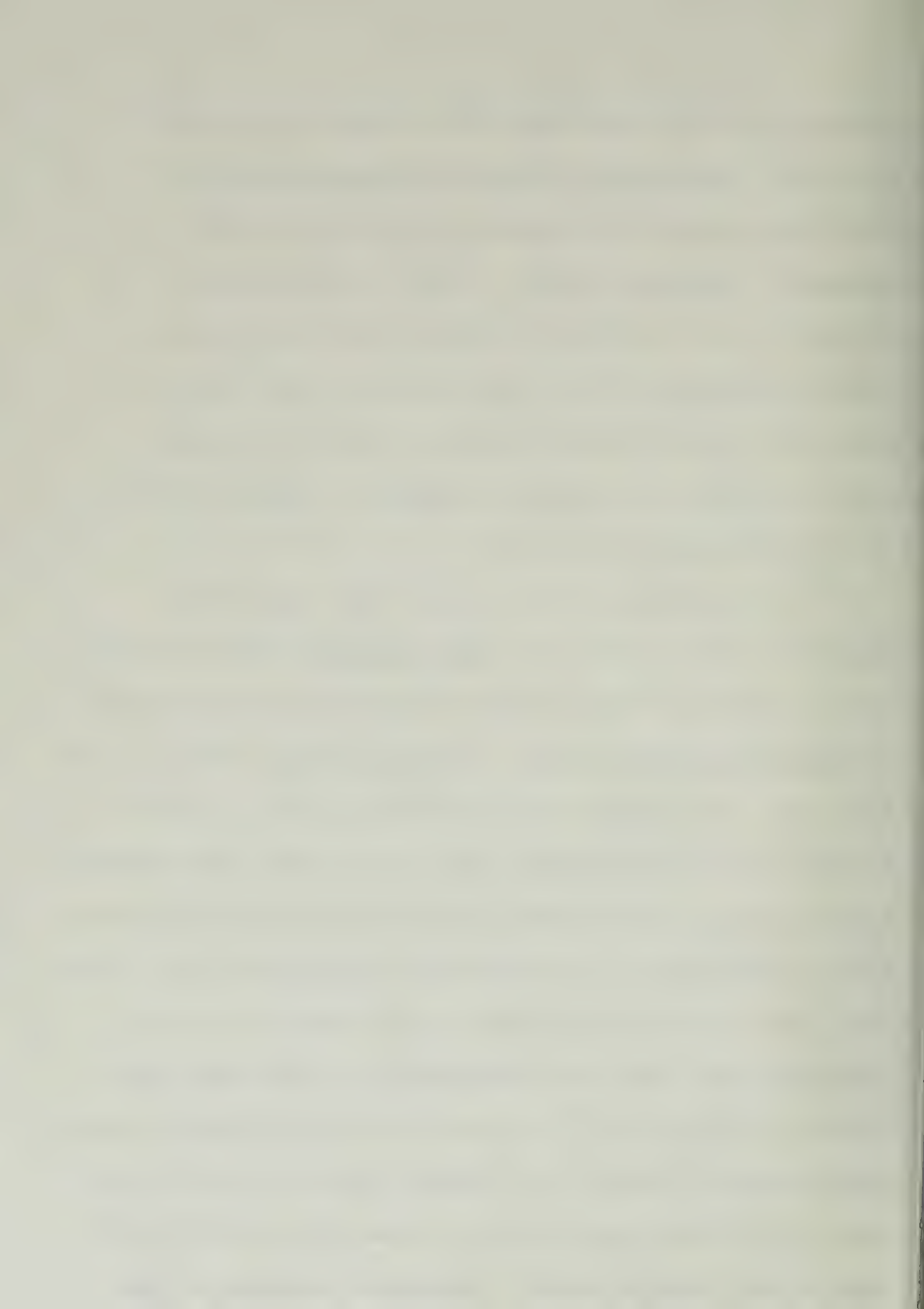
Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry. [Emphasis added.]

Of course, the essential function of CATV service of "receipt" and "distribution" is acknowledged by the rules themselves in the definition of CATV, §74.1101, and in



the caption of the carriage and non-duplication rule, §74.1103: "Requirement relating to distribution of television signals by community antenna television systems." [Emphasis added.] Thus, if our analysis in part II A of our Brief is correct that the constitutional protection of free speech includes the right to distribute and the right to receive, the CATV receipt and distribution of broadcast signals is squarely within the First Amendment protection.

The Commission has argued that "reasonable regulation of the use of the radio spectrum has been held not in violation of free speech under the First Amendment in National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943) (Government Brief, part III, p. 43). But the Supreme Court in Fortnightly has held the CATV service more closely akin to the viewers' function than the broadcasters', and thus the analogy to broadcasting regulation fails. Moreover, CATV in receipt and distribution makes no use of "spectrum space" and the underpinning of reasonable regulation similarly fails. In preserving scarce spectrum space the Commission through its licensing actually promotes the exercise of free speech, since if everyone were to broadcast no one could be heard. Commission reliance on NBC,



supra, as authority for prior restraint of CATV carriage is misplaced, since CATV service occupies no spectrum space. Unlike the broadcast licensing rules, the non-duplication rules do not promote free speech and are unreasonable.
2/

Indisputably same-day non-duplication limits and restricts access to available information and materials provided by the broadcaster. We concede that simultaneous non-duplication limits only the available source or channel of program materials. But same-day duplication protection, as required by the rules, directly restricts the availability and the viewer's choice of program materials. For example, when two nationally attractive network shows are simultaneously pitted against each other, the viewer cannot witness both. However, if CATV carriage brings these programs from a different time zone or merely different time

2/
However, the Tenth Circuit in a recent opinion has held non-duplication protection is reasonable regulation and not in violation of the First Amendment. Conley Electronics Corp. v. F.C.C., ___ F.2d ___, 12 R.R.2d 2108 (1968). We feel that the Tenth Circuit failed to distinguish the basis for regulation between broadcasting and CATV, and is therefore in error. The Tenth Circuit has been asked to stay its mandate pending a filing of a petition for certiorari.

of scheduled broadcast from a nearby station within the same time zone, the viewer's access to information and materials is widened. Additionally, the viewer's own convenience or availability may be at one broadcast time and not the other. Or, he may wish to watch the same program twice. In each of these instances, the Commission's rule restricts his right to receive and the CATV systems' right to distribute, and thus constitutes a prior restraint upon the flow of information.

The Commission has repeatedly stated that the Communications Act does not permit it to limit or select program sources or materials. Indeed, the act expressly prohibits this function under 47 U.S.C §326, the censorship provision. Most recently the Commission in official action advised the National Commission on the Cause and Prevention of Violence that the Commission was reluctant to undertake studies on the causal connection between violence and broadcast materials "because we are the licensing agency for the stations involved and are hesitant about encroaching on their freedom of program choice." FCC 68-622, Mimeo No. 16828, dated June 12, 1968. If the Commission is powerless

to limit the broadcasters' "freedom of program choice" then a fortiori it is powerless to limit the choice of available materials broadcasted to members of the viewing public, or the right of the CATV system to carry the available signals.

The only exercise of review over television program materials by the Commission has been through grant or renewal of licenses in comparing the service offered by competing broadcast applicants. Denial of an application for a license for a radio station under this accepted system of licensing, has been held to be no impairment of First Amendment freedom. However, there is no precedent supporting FCC's proscription of distribution of communications over closed-circuit cable facilities for which no federal license is required. And the FCC cannot lawfully condition the public's guaranteed access to broadcast materials upon relinquishment of the constitutional right to distribute or receive free of governmental restraint.

Southwestern and Fortnightly properly characterize CATV service as essentially reception and distribution of available broadcast signals. Moreover, Fortnightly



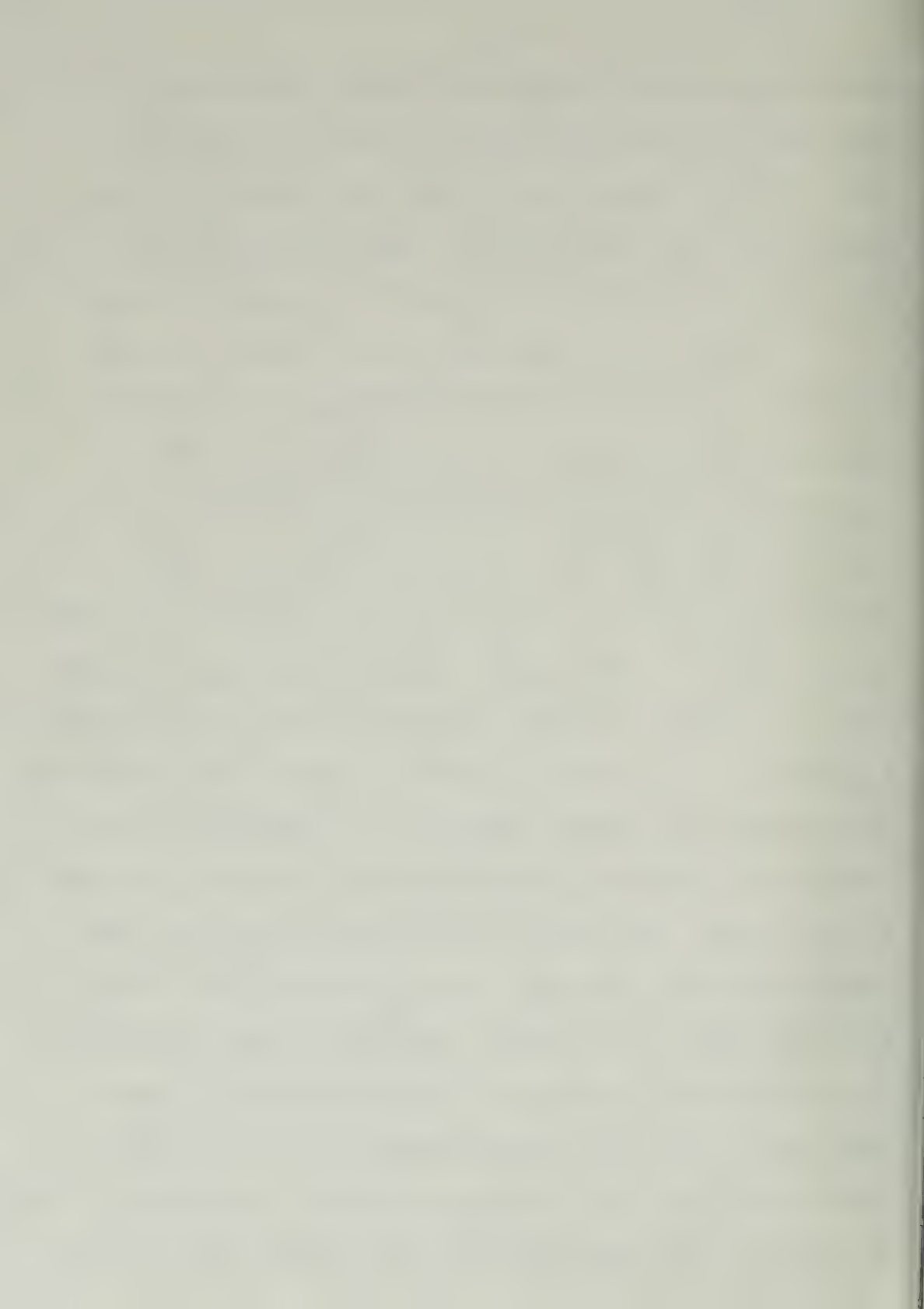
permits use of the available material free of any copy-right infringement. More important than access to copy-right material is the protection of freedom of speech and the access to available information and materials. Same-day non-duplication protection infringes upon this right.

III

We urged in Part II B and III of our Brief that the Commission's summary order limiting and curtailing an existing service violates the due process clause of the Fifth Amendment and is in conflict with pertinent statutes and regulations. In support of this contention we cited this Court's opinion in Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir., 1967). In reversing this Court's opinion, the Supreme Court noted that there is no claim that the Commission's "procedure in this respect is in any way constitutionally infirm." United States v. Southwestern Cable Co. 392 U S. ___, 36 LW 4554, at 4560 (No. 363, June 10, 1968). Further, the Court in upholding the Commission's summary procedure in freezing service, held that Section 312 of the Communications Act, the cease and desist provision, did not apply, since the question before the Commission was "only whether an existing situation should be preserved pending a

determination 'whether respondents' present or planned CATV operations are consistent with the public interest.'" (Id., at 4560). Rather than a cease and desist order, the Commission's order was designed "simply to preserve the situation as it existed at the moment of issuance." Ibid.

Here, the circumstances are manifestly different. Petitioner's existing service and carriage of the disputed signal pre-date promulgation of the Commission's CATV regulations. Because petitioner was in operation before March 17, 1966, under the rules it is conferred "grand-father rights" for the carriage of distant signals, §74.1105. However, under the Commission's order of compliance with its rules, it must halt carriage of same-day duplicating programs -- a substantial curtailment of existing service. Petitioner has asserted that the ordered diminution in service will cause a corresponding decline in subscription and threatens existence of the system. Additionally, petitioner has asserted that the maintenance of the duplicating signals has not and will not cause harm to the economic viability of local television. The CATV rules are premised on findings contrary to these assertions, i.e., that non-duplication protection does not harm the CATV, and that failure to provide it is harmful to the TV station. Petitioner maintains that irrespective of what



regulations the Commission may impose on new or existing service, it may not halt existing service without demonstrating in an evidentiary hearing that the premises for its rules have application to the particular operation. Petitioner argues that this right is constitutionally guaranteed by the due process clause of the Fifth Amendment. Moreover, if Commission licensees are given this right under §312 of the Act, non-licensees have at minimum similar rights and protections. Southwestern does not hold to the contrary; rather it supports petitioner's claim, since the Court there took such pains to exclude a §312 situation on the ground that the case before it halted only an extension of future service, not a curtailment or restriction of existing service. Accordingly, the Supreme Court's affirmance of the Commission's jurisdiction and the right to certain summary proceedings applicable to new service or the freezing of existing service, does not diminish petitioner's right to due process and an evidentiary hearing on the roll back of its service which pre-dates the rules.

CONCLUSION

For the foregoing reasons, petitioner prays that the Court vacate the Commission order herein and that it hold invalid same-day non-duplication, under §74.1103, or in the alternative that it declare that petitioner is entitled to an evidentiary hearing before imposing non-duplication protection.

Respectfully submitted,

John P. Cole, Jr.

Roger E. Zylstra

Alan Raywid

2011 Eye Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner
TOTAL TELECABLE, INC.

Of Counsel:

COLE, ZYLSTRA & RAYWID

2011 Eye Street, N.W.
Washington, D.C. 20006

July 6, 1968

RESPONDENTS' REPLY TO PETITIONER'S
SUPPLEMENTAL BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21,990

JUL 31 1968

TOTAL TELECABLE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

WIN M. ZIMMERMAN,
Assistant Attorney General,

HENRY GELLER,
General Counsel,

WARD E. SHAPIRO,
Attorney.

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel.

Department of Justice
Washington, D. C. 20530

Federal Communications Commission
Washington, D. C. 20554

FILED

JUL 24 1968

WM. B. LUCK, CLERK

TABLE OF AUTHORITIES

ases:

Page

<u>Conley Electronics Corp. v. U.S.A. and F.C.C.,</u> ___ F.2d ___ (C.A. 10, decided April 22, 1968).	6
<u>Fortnightly Corporation v. United Artists Television,</u> ___ U.S. ___, 36 USLW 4656.	1, 2, 3, 4,
<u>NBC v. U.S.,</u> 319 U.S. 190 (1943).	3, 4
<u>United States v. Southwestern Cable Co.,</u> ___ U.S. ___, 36 USLW 4553.	1, 2, 3, 4, 5,
<u>Wheeling Antenna Company, Inc. v. U.S.A. and F.C.C.,</u> ___ F.2d ___ (C.A. 4, decided February 28, 1968).	6

TATUTES

Communications Act of 1934, as amended, 48 Stat. 1064,
47 U.S.C. 151 through 609

Section 312 5

ther Authorities:

Second Report and Order, 2 F.C.C. 2d 725, 768-769. 5



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,990

TOTAL TELECABLE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

RESPONDENTS' REPLY TO PETITIONER'S
SUPPLEMENTAL BRIEF

By Order of June 24, 1968, this Court granted petitioner's request that the parties to this proceeding be permitted to file supplemental briefs in light of the recent Supreme Court decisions in United States v. Southwestern Cable Co., ___ U.S. ___, 36 USLW 4553, and Fortnightly Corporation v. United Artists Television, Inc., ___ U.S. ___, 36 USLW 4656. The Southwestern

decision, upholding the Commission's authority to regulate CATVs, lays to rest petitioner's chief argument on appeal, that the Commission has no jurisdiction over CATVs. In addition, as discussed below, it confirms our argument that the nonduplication rule, as a reasonable regulation under the public interest standard of the Communications Act, does not contravene the First Amendment.

We are of the view that the Fortnightly decision in which the Supreme Court held that CATV systems have no copyright liability has no bearing on this case. Fortnightly changed nothing insofar as the Commission's CATV rules are concerned. It left the CATV systems in the same position with regard to copyright which they had occupied when the Commission's rules were adopted and when this case was briefed and argued. See Second Report and Order, 2 F.C.C. 2d 725, 768-769. Accordingly, we have confined ourselves herein merely to a response to petitioner's supplemental brief.

At the outset, we note that nowhere in petitioner's supplemental brief is the claim made that its case is strengthened in any way by either Southwestern or Fortnightly. On the contrary, petitioner admits that the matter of the Commission's jurisdiction over CATV, which was the subject of Part I of its brief and the major point in its petition for review, has been rendered moot by the Southwestern decision.

At page 6 of its supplemental brief, petitioner argues that "CATV receipt and distribution of broadcast signals is squarely within the First Amendment protection." We respectfully submit that in making this argument, petitioner is merely taking

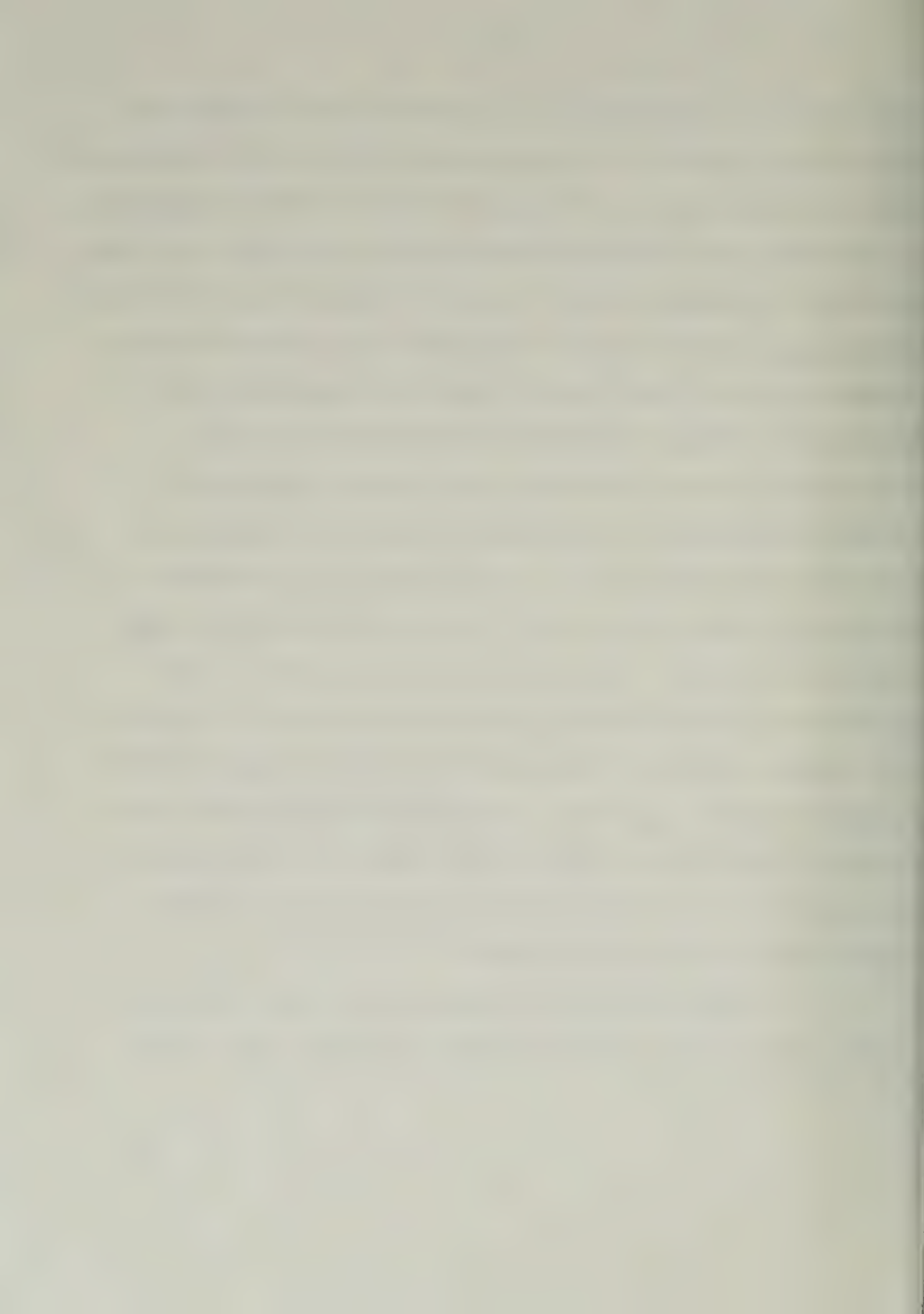
advantage of its opportunity to have a second bite of the apple. He argued to the same effect in his initial brief at pages 32-36. Our response at pages 43-46 of our brief was to the effect that assuming that the Commission has jurisdiction to regulate CATVs, so long as its rules and regulations are reasonably related to a valid objective, they do not constitute an infringement upon the rights of free speech of either the CATV system operator or the viewing public. Although Southwestern nowhere dealt with the First Amendment, its affirmance of the Commission's jurisdiction over CATVs validates the presumption upon which the Commission's argument rested. Thus, to the extent that it affects the Constitutional argument at all, Southwestern strengthens the validity of the Commission's position as previously briefed and argued by upholding the key premise of our argument.

Petitioner attempts to tie its case to the Fortnightly decision by referring to the Court's description of CATV service as being more closely related to the viewer's role than to that of the broadcaster. In this event, petitioner argues (Sup. Br. p. 6), the Commission's answer to its First Amendment argument that reasonable regulation of the use of the radio spectrum has been held not to be in violation of free speech, ^{1/} must fall. We

1/ NBC v. U.S., 319 U.S. 190 (1943).

note first that Fortnightly's description of CATV service was specifically limited to an interpretation of the word "performance" under the copyright law. Second, petitioner's view of Fortnightly would render meaningless the Commission's jurisdiction over CATVs. Certainly, Fortnightly cannot be read to vitiate the just-released Southwestern decision wherein the Supreme Court stated that the Commission might issue rules and regulations governing CATVs "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (36 USLW, at 4559). Additionally, we note that petitioner's First Amendment arguments that CATVs use no spectrum space and therefore that the rationale of the NBC case is inapplicable (Sup. Br. p. 6), and its attack on the nonduplication rule as prohibited censorship in that it restricts the viewer's choice and the right of the CATV to carry available programs (Sup. Br. pp. 7-9), were previously made by petitioner at pages 34-36 of its original brief, answered by the Commission at pages 43-46 of its brief, and discussed at oral argument. Again, nothing new has been raised.

At pages 10-12 of its supplemental brief, petitioner repeats the assertions in its original brief (at pages 41-47)



that (1) the ordered diminution in service (i.e., no further same-day carriage of duplicated programs) will cause a corresponding decline in subscriptions and threatens the existence of the system, (2) that carriage of the duplicating signals has not and will not cause harm to the economic viability of local television, and (3) that the Commission may not halt its service without first demonstrating in an evidentiary hearing that the premises for the Commission's rules have application to its operation.

In regard to the latter, petitioner renews its Section 312 argument advanced at pages 41 and 50-51 of its original brief. Petitioner now contends that Southwestern supports its position that its situation -- one in which it alleges a curtailment or restriction of existing service by virtue of the requirement to cease same day duplication -- differs from one in which only an extension of service is involved and that only in that instance was the hearing requirement of Section 312 found inapplicable. We respectfully submit that petitioner has misconstrued the Court's 312 discussion. In general, it merely held that Section 312 did not apply for "312(b) provides that a cease-and-desist order may issue only if the respondent 'has violated or failed to observe' a provision of the Communications Act or a rule or regulation promulgated by the Commission under the Act's authority.



Respondents here were not found to have violated or to have failed to observe any such restriction . . .," 36 USLW, at 4560. Thus, the distinction between hearings in regard to existing as opposed to planned operation which petitioner seeks to make was not made by the Supreme Court.

Again, each of these arguments was answered by the Commission in its brief and discussed at oral argument. Additionally, we invite the Court's attention to the fact that decisions reached by other circuits since this case was submitted for this Court's consideration have upheld the reasonableness of the Commission's nonduplication rules in furtherance of the desiderata of the Communications Act. See Wheeling Antenna Company, Inc. v. U.S.A. and F.C.C., ___ F.2d ___ (C.A. 4, decided February 28, 1968), and Conley Electronics Corp. v. U.S.A. and F.C.C., ^{2/} ___ F.2d ___ (C.A. 10, decided April 22, 1968), which we submit also lays to rest petitioner's Section 312 argument.

^{2/} On July 19, 1968, Conley Electronics petitioned for a writ of certiorari.

CONCLUSION

For the above reasons, as well as those already presented to the Court in the original briefing and argument herein, we believe the Commission's orders should be affirmed.

Respectfully submitted,

EDWIN M. ZIMMERMAN,
Assistant Attorney General,

HENRY GELLER,
General Counsel,

HOWARD E. SHAPIRO,
Attorney.

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel.

Department of Justice
Washington, D. C. 20530

Federal Communications Commission
Washington, D. C. 20554

July 22, 1968.

CERTIFICATE OF SERVICE

I, Lenore G. Ehrig, hereby certify that the foregoing
"Respondents' Reply to Petitioner's Supplemental Brief" was served
this 22d day of July, 1968, by mailing true copies thereof, postage
prepaid, to the following persons at the addresses shown below:

John P. Cole, Jr.
Roger E. Zylstra, Esq.
Alan Raywid, Esq.
2011 Eye Street, N. W.
Washington, D. C. 20006

Paul Dobin, Esq.
Law Offices of Marcus Cohn
317 Cafritz Building
Washington, D. C. 20006 .

Lenore G. Ehrig

No. 21991

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CLIFFORD JAMES

Appellant,

vs.

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin,

Appellee.

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

LOUISE H. RENNE
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1337

Attorneys for Appellee

FILED

OCT 16 1967

WM B LUCK CLERK

OCT 16 1967

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF PROCEEDINGS	1
ARGUMENT	
I. APPELLANT'S CONTENTION THAT ADMIS- SIONS WERE OBTAINED FROM HIM THROUGH THE USE OF FORCE AND VIOLENCE IS WITHOUT MERIT.	7
II. NEITHER THE RIGHT TO CONFRONTATION NOR THE RIGHT TO CROSS-EXAMINATION ENUNCIATED IN <u>POINTER v. TEXAS</u> , 380 U.S. 400 (1965) AND <u>DOUGLAS v. ALABAMA</u> , 380 U.S. 415 (1965) WERE VIOLATED BY THE INTRODUCTION OF APPELLANT'S ACCOMPLICE'S CONFESSION.	12
III. THE DISTRICT COURT PROPERLY REFUSED TO HOLD AN EVIDENTIARY HEARING AND TO APPOINT COUNSEL FOR APPELLANT.	15
CONCLUSION	17

TABLE OF CASES

	<u>Page</u>
Browning v. Crouse 327 F.2d 529 (10th Cir. 1965) cert. denied, 384 U.S. 973 (1966)	7
Commonwealth of Pennsylvania ex rel. Harmon v. Claudys 350 U.S. 116 (1963)	16
Douglas v. Alabama 380 U.S. 415 (1965)	12,13
Escobedo v. Illinois 378 U.S. 478 (1964)	7
Eskridge v. Rhay 345 F.2d 778 (9th Cir. 1965) cert. denied, 382 U.S. 996 (1966)	10
Ford v. Boeger 362 F.2d 999 (8th Cir. 1966) cert. denied, 386 U.S. 914 (1967)	15
Haynes v. Washington 373 U.S. 503 (1963)	11
Johnson v. New Jersey 384 U.S. 719 (1966)	7
Kerrigan v. Scafati 347 F.Supp. 713 (D.C. Mass. 1965) aff'd, 364 F.2d 759 (1st Cir. 1966) cert. denied, 385 U.S. 953 (1966)	14
Nelson v. California 346 F.2d 73 (9th Cir. 1965) cert. denied, 382 U.S. 964 (1965)	10
Pointer v. Texas 380 U.S. 400 (1965)	12,13
Ratley v. Crouse 365 F.2d 320 (10th Cir. 1966)	16
Townsend v. Sain 372 U.S. 293 (1963)	16

TABLE OF CASES (Contd.)

	<u>Page</u>
United States v. Pate 362 F.2d 89 (7th Cir. 1966)	16
Webb v. Crouse 359 F.2d 394 (10th Cir. 1966)	16

STATUTES

California Code of Civil Procedure § 1870 (Now, Evidence Code § 1221)	14
--	----

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CLIFFORD JAMES,

Appellant,

vs.

No. 21991

LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin,

Appellant.

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, U.S.C., section 2241. The jurisdiction of this Court to review the denial of the writ is conferred by Title 28, U.S.C., section 2253, which makes the final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF PROCEEDINGS

This is an appeal from an order dated April 13, 1967, by the Honorable Alfonso J. Zirpoli, United States District Judge for the Northern District of California, denying the petition for writ of habeas corpus filed by John Clifford

James, petitioner and appellant (RT 38-40).^{1/} This is the second time that this matter has come before this Court in the aftermath of the following proceedings:

A. Proceedings in the state courts.

On August 27, 1959, appellant was convicted of violating California Penal Code section 211 (robbery) in the Los Angeles Superior Court, after a trial by jury, in which he was represented by counsel, and was sentenced to state prison for the term prescribed by law. Appellant did not appeal from this conviction (RT 6-7).^{2/}

Subsequently he filed several petitions for writ of habeas corpus in the California state courts, all of which were denied without opinion (RT 7-8).

B. Proceedings in the federal courts.

On August 27, 1965, appellant filed an application for writ of habeas corpus in the United States District Court for the Northern District of California. That same day an order to show cause was issued by the district court.

1. The transcript of record in three volumes is designated herein as "RT." Unless otherwise indicated, all "RT" references, standing alone, refer to volume I. However, since volumes II and III which contain the record of the state trial proceedings, are also each paginated beginning with page 1, they are designated here, e.g., RT II-1, RT III-3.

2. The facts of record are that appellant was charged with having committed two grocery store holdups in Los Angeles with one William D. Bates. However, the jury convicted appellant only of the robbery in which the grocery store owner was able to make positive identification, the other victim being unable to state that appellant was the robber (RT Vol. II, III).

On August 30, 1965, appellant moved to withdraw his petition, a request which the district court granted on September 3, 1965 (RT 8).

On September 15, 1965, appellant moved to withdraw his motion to withdraw his original petition. The district court, on October 7, 1965, issued an "Order Denying Request to Reopen Case" on the ground that the only substantial federal question raised in the original petition was that appellant was interrogated by the police in violation of the rule announced in Escobedo v. Illinois, 378 U.S. 478 (1964), and, that the Escobedo decision did not operate retroactively to affect convictions which had become final prior to June 22, 1964 (RT 8).

Appellant appealed from this decision of the district court and following the issuance of a certificate of probable cause, the matter came before this Court. This Court, on October 10, 1966, ruled that although the district court correctly rejected appellant's petition insofar as it was based on a violation of Escobedo, two remaining allegations contained in the petition required further review by the district court. Thus, this Court reversed and remanded the case to the district court to determine whether appellant's conviction was based in part upon (1) oral admissions obtained from appellant by the use of threats and physical violence, and (2) the confession of an accomplice who was

not produced for cross-examination (RT 1-2).^{3/}

On January 6, 1967, the district court issued its order to show cause pursuant to the ruling of the Court of Appeals (RT 3). At the same time it also issued its order denying a petition for bail filed by appellant (RT 4). On January 31, 1967, appellee filed its return to the order to show cause with points and authorities in support (RT 6-18). Concurrent with the filing of its return appellee also filed the transcript of the record proceedings of appellant's trial at Los Angeles (RT Vols. II, III). On February 16, 1967, appellant filed a reply brief and a letter request for counsel (RT 20-24), and on March 14, 1967, he again filed a request for counsel (RT 25-28). On March 31, 1967, appellant also filed a supplemental reply brief (CT 29-37).

Following the submission of these documents, as well as appellee's appearance before the court, the district court issued its order denying the petition for writ of habeas corpus and dismissing the proceedings (CT 38-40). In so ruling upon appellant's petition, the court first held that appellant's contention that oral admissions were obtained by the use of threats and violence was without merit. Thus, the court noted that the record of the trial disclosed that Police Officer Rainey who interrogated

3. The Court's opinion is reported at James v. Wilson, 367 F.2d 386 (9th Cir. 1966).

appellee when the incriminatory statements were obtained, also testified that he did not use force, violence, threats or promises to obtain appellant's admissions. Despite this testimony and the fact that appellant testified in his own defense, appellant at no time placed in issue these facts, nor, in the course of the habeas corpus proceedings, had he ever offered any explanation for his failure to do so. Indeed, although appellant testified as to the events which occurred after his arrest, at no time did appellant testify that threats or violence were used against him to coerce admissions of guilt (RT 39).

As the district court also noted, the only possible hint of coercion came in appellant's testimony that the police officers had told him that he was "chicken" because he did not have the "guts" to "clean up their books." Although Officer Rainey denied making this statement, the district court held, that even assuming arguendo, that it was made, such statements do not amount to the type of coercion which would "overbear the will of petitioner." citing Haynes v. Washington, 373 U.S. 503 (1963). The court also noted that this was true even when viewed with awareness that appellant was not warned of his constitutional right to remain silent at a time prior to the June 22, 1964, date for the prospective application of the rule set forth in Escobedo v. Illinois, supra.

The district court further ruled that appellant's contention that his accomplice's confession was introduced into evidence contrary to his constitutional right of confrontation and cross-examination, was equally without merit. The district court held that the record disclosed that the confession alleged to be that of appellant's co-defendant, was in fact introduced under the California rule of evidence which allows the introduction of a confession of a co-defendant as that of the defendant where there has been an adoptive admission by the affirmative conduct of the defendant. Moreover, as the court also noted, the record disclosed that the jury was not permitted to take the statement of appellant's accomplice to the jury room with them and were also instructed to determine whether the defendant's conduct in response to the alleged confession of his accomplice constituted a confession, and admission, or neither. Accordingly, the court ruled that the constitutional right of confrontation and cross-examination set forth in Pointer v. Texas, 380 U.S. 400 (1965) and Douglas v. Alabama, 380 U.S. 415 (1965) did not apply.

Thereafter, on June 5, 1967, the district court issued an order granting the certificate of probable cause to appeal (CT 48-49) in accordance with appellant's request (CT 41-47). The court also issued its order granting appellant permission to appeal in forma pauperis (CT 50). On

June 9, 1967, appellant filed a notice of appeal with this Court (CT 54-57), and this appeal follows.

The questions involved in this appeal are as follows:

1. Whether the district court properly ruled that appellant's contention that oral admissions were obtained from him by the use of threats and violence is without merit.

2. Whether the district court properly held that appellant's contention that his accomplice's confession was introduced into evidence contrary to his constitutional right to confrontation and cross-examination, is equally without merit.

3. Whether the district court properly refused to hold an evidentiary hearing and to appoint counsel for appellant in the proceedings.

ARGUMENT

I.

APPELLANT'S CONTENTION THAT ADMISSIONS WERE OBTAINED FROM HIM THROUGH THE USE OF FORCE AND VIOLENCE IS WITHOUT MERIT.

Before turning to the primary issues raised by this appeal, it should be noted at the outset that appellant's attempt to again renew the contention that he is entitled to habeas corpus relief because he was interrogated by the police in violation of the rule announced in Escobedo v. Illinois, supra, must be rejected (AOB 5-9).

In the per curiam opinion previously issued in this case, this Court held that "in the light of Johnson v. New Jersey, 384 U.S. 719 (1966), the district court correctly rejected appellant's petition for habeas corpus insofar as it was based upon Escobedo v. Illinois, 378 U.S. 478 (1964)" (RT 1). Having previously decided this point adversely to appellant, appellant is now barred from again raising that issue here. Browning v. Crouse, 327 F.2d 529, 531 (10th Cir. 1964), cert. denied, 384 U.S. 973 (1966). Indeed, an alleged failure to receive a warning of constitutional rights is relevant to this case only insofar as it bears upon appellant's contention that oral admissions were obtained from him through the use of force and violence. Johnson v. New Jersey, supra, at 730. As to this issue, however, appellant's contention is totally lacking in merit as the district court properly concluded when viewed in the light of the record of the state trial proceedings.

Thus, the record of the state trial proceedings shows that appellant was charged with having committed two grocery store holdups with an accomplice William D. Bates (RT Vol. II). A part of the evidence establishing appellant's guilt was the testimony of Maurice T. Rainey, a police officer for the City of Los Angeles who testified that appellant orally admitted his participation in the grocery store holdup on two separate occasions.

Thus, Officer Rainey testified that after appellant was arrested, he questioned appellant twice at the Newton Street Station where appellant had been taken for booking following his arrest. The two conversations took place on May 26, 1959, at 1:30 p.m. and 2:30 p.m. respectively. During the first conversation appellant denied taking part in either of the two robberies with which he was charged. However, the second time that Officer Rainey spoke with appellant, appellant orally admitted his complicity in the grocery store holdups (RT Vol. II 29-32, 37).

The next morning, at 9:50 a.m. in Room 606 at the Record Office of the Superior Court Criminal Clerk in the Hall of Justice, appellant again admitted his guilt when Officer Rainey showed appellant the written confession that his accomplice Bates had signed. When shown Bates' confession, which set forth the details of the robbery and implicated appellant, appellant stated that his accomplice's confession of guilt was correct except for the fact that he and Bates had split the money evenly, rather than he (appellant) receiving more of the money in the one robbery as Bates had stated (RT 10-11, 15-16; RT Vol. II, 33-40).

Now, in these habeas corpus proceedings appellant claims that these admissions were obtained through the use of threats and force. Although appellant has never been clear as to which admission he is attacking, (or that the

admissions obtained on both occasions were based upon threats and violence^{4/} it is clear that neither of the admissions was obtained through threats or force. On the contrary, the record of the state trial proceedings coupled with appellant's complete failure to "explain away" the implications of that record, render his charges completely without merit.

Thus before testifying as to any of the admissions made by appellant, Officer Rainey stated that neither force nor threats were used against appellant, nor were promises of leniency made, but, on the contrary, the admissions made by appellant were freely and voluntarily made (RT II, 29, 31, 34). Despite this testimony, appellant represented by counsel, did not raise an issue of involuntariness at any time during the trial.^{5/} Instead, appellant denied any

4. For example, in his brief here, appellant states that while threats were made against him during the interrogation at the Newton Street Station on May 26, 1959, he "consistently denied any knowledge of these crimes" at that time. It was not until the following day, May 27, 1959, when he was informed of his accomplice's confession, that he was so beaten that he was 'forced' to make an oral admission to these crimes to relieve some of the physical agony reaped upon him by the police officers" (AOB 3-4).

5. Thus, it may be noted that although the district court did not base its decision on this ground, it seems clear that by failing to raise this point at trial, appellant has deliberately bypassed adequate state remedies. Nelson v. California, 346 F.2d 73 (9th Cir. 1965), cert. denied, 382 U.S. 964 (1965); Eskridge v. Rhay, 345 F.2d 778 (9th Cir. 1965), cert. denied, 382 U.S. 996 (1966). Similarly, in failing to appeal his conviction, he

participation in the holdups and although he described the events which occurred after his arrest, he was silent concerning the admissions to which Officer Rainey testified. Indeed, appellant denied even seeing Bates' confession until the preliminary examination, although he testified that Officer Rainey had previously told him about it (RT II 46-61, 52-53).

The only possible hint of coercion came in appellant's testimony that Officer Rainey and Officer Williams told him that he was "chicken because he did not have the 'guts' to clean up their books." (RT II 53-54). Officer Rainey, however, who was specifically recalled to the stand to testify as to this alleged "coercion," denied making such a statement (RT II 61-62). As the district court held, however, even assuming arguendo that Officer Williams in fact made these statements, such a statement clearly does not amount to the type of coercion which would "'overbear' the will of appellant," Haynes v. Washington, 373 U.S. 503 (1963), even when viewed with the fact that appellant did not receive an Escobedo-type warning as to his constitutional right to counsel or to remain silent.

Accordingly, we submit, that based as they are

Ftn. 5 Contd.

deliberately bypassed adequate state remedies, albeit he asserted in his petition that he did not know "the proper way of filing for an appeal" (Pet. 3).

upon a proper view of the law and of the record, the district court's conclusion that appellant's allegation of coercion was without merit, as a matter of law, is fully supported by the record. Thus, with full opportunity to raise the issue of coercion at his trial eight years ago, and despite the affirmative evidence introduced by the state, appellant kept silent. Instead, he chose to deny participation in the hold-ups, and, indeed, stated that he never even saw Bates' confession until the preliminary hearing.^{6/} Moreover, even assuming arguendo, that Officer Rainey called him "chicken" because he would not "clean up the books," such a statement scarcely amounts to a threat or such coercion as to render his admissions of guilt involuntary.

II.

NEITHER THE RIGHT TO CONFRONTATION NOR
THE RIGHT TO CROSS-EXAMINATION ENUNCIATED
IN POINTER v. TEXAS, 380 U.S. 400 (1965)
AND DOUGLAS v. ALABAMA, 380 U.S. 415 (1965)
WERE VIOLATED BY THE INTRODUCTION OF
APPELLANT'S ACCOMPLICE'S CONFESSION.

Appellant has also urged that his constitutional right of confrontation and to cross-examination enunciated

6. It may be noted that even before this Court appellant is somewhat less than accurate in his charges. For although he indicated at his trial that Officer Rainey was not the arresting office (as Officer Rainey so testified [RT II 28]), or, at the very least, that Officer Rainey was not the one who informed him of the charges for which he was arrested (RT II 51-52), he now has concocted quite an elaborate story in his brief as to what Officer Rainey told him when he arrested him in Los Angeles (AOB 3).

in Pointer v. Texas, supra, and Douglas v. Alabama, supra, were violated by the introduction into evidence of his accomplice's confession at a time when his accomplice was not produced for cross-examination during the trial. However, as the record establishes, and as the district court so found, appellant has been somewhat less than accurate as to what transpired during his trial. When his claim is examined in the light of what actually happened at his trial, it is clear that appellant was not deprived of any constitutional right.

Thus, as set forth above, Officer Rainey had two conversations with appellant at the Newton Street Station where appellant was booked, during the latter of which appellant orally admitted his guilt. The next day, at 9:50 a.m. in Room 606, at the Record Office of the Superior Court Criminal Clerk in the Hall of Justice, Officer Rainey showed appellant the confession of his accomplice, William D. Bates. Bates' confession set forth the details of the robberies and implicated appellant. When shown the confession appellant stated that it was a true account of the robbery except for the fact that he and Bates had split the money evenly, rather than he (appellant) having received more of the robbery "loot" as Bates had stated in the confession (RT II 33-40).

Thus, as shown by the trial transcript, Bates'

confession, which was then read to the jury but which the jury was not permitted to take with them to the jury room, was placed before the jury only because of appellant's reaction to it, and because appellant had orally adopted the confession as his own. It was necessary to have Bates' confession before the jury, not because Bates was offered as the testimonial witness, but in order to have appellant's admissions in response placed in context. Cf., Kerrigan v. Scafati, 247 F.Supp. 713, 721 (D. Mass. 1965), aff'd 364 F.2d 759 (1st Cir. 1966), cert. denied, 385 U.S. 953 (1966).

Thus, as the district court stated, the confession of Bates was introduced only because there had been an adoptive admission by the affirmative conduct of the defendant, which is permissible under the California Rules of Evidence.^{7/} Under these circumstances, the constitutional right to confrontation and cross-examination, set forth in the Pointer and Douglas cases, do not apply since the jury was only to consider the evidence if it was determined to be an admission or confession of the appellant himself (RT II, 62-63, RT III, 15-16). Confrontation or cross-examination of Bates would be totally irrelevant to the purpose for which his confession was used. Thus, appellant's

7. See e.g. former section 1870 of the Code of Civil Procedure, now section 1221 of the Evidence Code (effective January 1, 1967).

contention in this respect is totally without merit.

III.

THE DISTRICT COURT PROPERLY REFUSED
TO HOLD AN EVIDENTIARY HEARING AND
TO APPOINT COUNSEL FOR APPELLANT.

Following this Court's order for "further proceedings not inconsistent with the opinion of the Court", the District Court issued a show cause order to appellee. A return to the district court's order, the state court record, and documents filed by appellant (see infra, p. 4) were then before the District Court in reaching its decision.

Nevertheless, appellant contends that the district court erred in refusing to hold a full evidentiary hearing and to appoint counsel to represent him in the proceedings. We submit, however, that such a course of action was not required, since the record before the district court was clearly sufficient to support its decision that neither of appellant's contentions were meritorious, as a matter of law.

First, of course, an evidentiary hearing was clearly unnecessary to determine whether either the Pointer or Douglas cases was applicable to the jury's consideration of Bates' confession and appellant's reaction to it. For, evidentiary hearing is clearly unnecessary in a habeas corpus proceeding when conclusions of law only are in dispute. See e.g., Ford v. Boeger, 362 F.2d 999, 1003 (8th

Cir. 1966), appeal pending, cert. denied, 386 U.S. 914 (1967). This is similarly true insofar as the legal effect of Officer Rainey's alleged remark that appellant was "chicken" is concerned.

Similarly, appellant's charges of coercion are so completely without merit in light of Officer Rainey's specific testimony at trial, on the one hand, and appellant's failure to raise the issue at trial on the other, and no explanation for his failure to do so, since then, that an evidentiary hearing is not required. On the contrary, a district court may properly dismiss a petition for writ of habeas corpus without an evidentiary hearing, if its examination of the trial transcript discloses that the grounds of relief are without merit. Townsend v. Sain, 372 U.S. 293 (1963); United States v. Pate, 362 F.2d 89 (7th Cir. 1966). This is particularly true if the factual allegations are "patently frivolous or false in a consideration of the whole record" Commonwealth of Pennsylvania, ex rel. Harmon v. Claudys, 350 U.S. 116, 119 (1963); Webb v. Crouse, 359 F.2d 394 (10th Cir. 1966). Under circumstances such as the present, therefore, where an evidentiary hearing is not required, it seems clear appellant was not entitled to counsel, which, of course, is not a matter of right in federal habeas corpus proceedings. See e.g., Eskridge v. Rhay, supra, at 782; Ratley v. Crouse, 365 F.2d 320 (10th Cir. 1966).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the writ of habeas corpus should be affirmed.

DATED: October 16, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

Louise H. Renne

LOUISE H. RENNE (Mrs.)
Deputy Attorney General

Attorneys for Appellee

LHR:lp
24 CRSF
65-1535

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: October 16, 1967

Louise H. Renne
LOUISE H. RENNE (Mrs.)
Deputy Attorney General

No. 21991

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CLIFFORD JAMES,)
)
Petitioner and Appellant,)
)
vs.)
)
LOUIS S. NELSON, Warden,)
California State Prison,)
San Quentin,)
)
Respondents and Appellees.)

APPELLEE'S PETITION FOR REHEARING

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

LOUISE H. RENNE
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1337

Attorneys for Appellees

FILED

APR 10 1968

U. S. DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CLIFFORD JAMES,

Petitioner and Appellant,

vs.

LOUIS S. NELSON, Warden,
California State Prison,
San Quentin,

Respondents and Appellees.

No. 21991

APPELLEE'S PETITION FOR REHEARING

TO THE HONORABLE J. WARREN MADDEN, JUDGE OF THE
UNITED STATES COURT OF CLAIMS, AND M. OLIVER KOELSCH AND
JAMES R. BROWNING, CIRCUIT JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to the United States Court of Appeals
for the Ninth Circuit Rule 23, Title 28 United States Code,
appellee, Louis S. Nelson, Warden, San Quentin Prison,
California, hereby petitions for a rehearing to consider
the order filed in this action on March 11, 1968, which
states:

"The order of the United States District
Court, denying Petition for a Writ of Habeas
Corpus, is vacated and the cause is remanded
with directions to hold an evidentiary hearing
limited to the question of the voluntariness

of oral admissions made by petitioner, and of whether or not (in the event they are found to have been coerced) he deliberately waived objection to their introduction into evidence at the trial. Maldonado v. Eyma, 377 F.2d 526 (9th Cir. 1967)."

This order is erroneous for two reasons: First, it overlooks evidence and clear conclusions which must be drawn from the state court records presently lodged with the Court; and, second, the documents filed by appellant after appellee's brief was filed but before submission of the cause, show that appellant now denies making the oral confessions, which he earlier claimed were coerced. In amplification of these grounds, the following is stated:

I

The state court records belie appellant's claims of a coerced confession. The transcripts of trial lodged with the Court show that Police Officer Rainey testified that appellant twice admitted his guilt in the holdups, first, at a local police station on the afternoon of May 26, 1959, and, later, the next morning at the Hall of Justice when shown his accomplice's confession. Officer Rainey testified that neither force nor threats were used. (RT II 29, 31, 34).

When appellant took the stand, he denied participating in the robberies, and was silent about the alleged

admissions he had made. Although he testified that he had been informed of his accomplice's confession, he denied having seen his accomplice's confession until the preliminary hearing. (RT II 46-61, 52-53.) The only possible hint of coercion to which appellant testified was that he had been told he was "chicken" because he did not have the "guts to clean up the books" (RT II 53-54). However, this was a remark which was specifically denied by Officer Rainey when recalled to the stand, and is not coercion of a type to overbear the will.

The state court records, therefore, show that appellant did not rebut the state's proffered testimony at trial, and, that if an issue of involuntariness was raised, it was raised in a most fleeting and inconsequential manner. However, from appellant's failure to specifically assert coercion at trial, despite the opportunity to fully raise the issue at a time when he was represented by adequate and competent counsel and, further, because of the failure to explain since then either why he did not urge coercion, (or, indeed, until rather recently, why he implicitly denied having even made the second statement) the conclusion must be drawn that appellant's charges of coercion are without merit and contrived.

II

Any doubt as to the invalidity of appellant's petition is put to rest by the "Application to Amend and

Motion for Production of Documents" and "Appellant's First Amended Brief" (treated by this Court as a reply brief), after these documents were received by the Court on November 15, 1967.

Until these documents were filed, appellant had claimed throughout these habeas corpus proceedings that the confessions were coerced. See e.g., Appellant's Opening Brief at page 5. Now, however, in these amended documents, appellant has stated that he never admitted his guilt, despite the coercion heaped upon him. See e.g., pages 2-3 of the "Application," and pages 5, 7, and 9 of Appellant's Reply Brief. The ordered evidentiary hearing, therefore, can serve no purpose since appellant now claims he never made the admissions allegedly coerced. Under these circumstances, therefore, the petition should be denied now without a hearing and without having incurred needless taxpayer expense or inconvenience to witnesses.

To the extent that petitioner now has changed his theory of relief from a charge of coerced confession to a charge of perjured testimony, we point out first, that petitioner has failed to allege that the issue in this particular form, has been presented in the state courts, as he also fails to allege a knowing use of such alleged perjured testimony.

/

/

CONCLUSION

For the above reasons, it is respectfully
requested that the petition for rehearing be granted.

Dated: April 10, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

Louise H. Renne
LOUISE H. RENNE (Mrs.)
Deputy Attorney General

Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellee, Louis S. Nelson, in the above-entitled action, and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated: April 10, 1968

Louise H. Renne

LOUISE H. RENNE (Mrs.)
Deputy Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN FLOYD TENNANT,)	
)	
Appellant,)	
)	
vs.)	NO. 21997
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	
)	

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney

SHELBY R. GOTT
Assistant U.S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

TOPICAL INDEX

Page

TABLE OF AUTHORITIES	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV ARGUMENT	3
A. THE APPEAL IS NOT TIMELY	3
B. THE APPELLANT WAS IN CUSTODY PURSUANT TO LAWFUL ARREST	5
V CONCLUSION	13
CERTIFICATE	14

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Banks v. United States, 240 F.2d 302 (9th Cir. 1957)	4
Cornish v. State, 215 Md. 64, 67, 237 A.2d 170, 172 (1957)	10
Crow v. United States, 203 F.2d 670, 672 (9th Cir. 1948)	4
Foreman v. Warden, 241 F. Supp. 161, 163-164	10
Frazier v. United States, 339 F.2d 745	8
Giles v. United States, 157 F.2d 588, 591-2	8
Gilliam v. United States, 189 F.2d 321, 327 (6th Cir. 1951)	11
Glasser v. United States, 315 U.S. 60 (1942)	12
Henry v. United States, 361 U.S. 98, 103	8
Jenkins v. United States, 161 F.2d 99	9
Marion v. United States, 171 F.2d 185, 186 (9th Cir. 1948), rehearing denied January 28, 1949	4
People v. Crider, 76 Cal.App. 101	7, 8
People v. Drake, 162 Cal. 248	7
People v. Martensen, 76 Cal.App. 763	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
People of State of California v. Maxwell, 125 F.Supp. 18	8
People v. Randolph (1957), 306 P.2d 98, 147 Cal.App.2d 836	6, 8, 12
Plazola v. United States, 291 F.2d 56 (9th Cir. 1961)	8, 11, 12
Stein v. United States, 337 F.2d 14 (9th Cir. 1964)	12
Trimble v. United States, 369 F.2d 950, 951 (District of Columbia, 1966)	10
United States v. Di Re, 332 U.S. 581, 589 (1947)	4
United States v. Person, 223 F.Supp. 982 (S.D. CAL, C.D., 1963)	9
United States v. Robinson, 361 U.S. 220, 224	4

<u>Statutes</u>	
Title 18, United States Code, Section 751	1, 2
Title 18, United States Code, Section 3231	1
Title 21, United States Code, Section 176(a)	1, 2
Title 28, United States Code, Section 2255	3, 4
Federal Rule of Criminal Procedure 37(a)(2)	4
California Penal Code, Section 835	5, 6
California Penal Code, Section 266(d)	7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN FLOYD TENNANT,)	
)	
Appellant,)	
)	
vs.)	NO. 21997
)	
UNITED STATES OF AMERICA,)	
)	
Appellee.)	
)	

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty in all counts of a three-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 751 and 3231, and Title 21, United States Code, Section 176(a).

STATEMENT OF THE CASE

Appellant was charged in each count of a three-count indictment returned on August 19, 1964. Count One alleged that appellant, together with Jerald Alfred Trujillo, knowingly and with intent to defraud, imported two pounds of marihuana into the United States from Mexico [C.T. 2].¹

Count Two alleged that appellant, together with Jerald Alfred Trujillo, knowingly and with intent to defraud, concealed and facilitated the transportation and concealment of two pounds of marihuana in violation of Title 21, United States Code, Section 176(a) [C.T. 3].

Count Three charged that appellant was in the custody of an officer of the United States pursuant to lawful arrest for a felony and did escape from such custody in violation of Title 18, United States Code, Section 751 [C.T. 4].

Jury trial on all three counts commenced and ended on April 22, 1965, before the late Honorable William C. Mathes, wherein appellant was found guilty on all three counts.

Thereafter on May 12, 1965, Judge Mathes sentenced appellant to six years on each of Counts One and Two to run concurrently, and five years on Count Three to run consecutively with the sentences on Counts One and Two, making a

¹ "C.T." refers to Clerk's Transcript.

total of eleven years to serve [C.T. 37].

Appellant did not appeal from this judgment. On December 19, 1966, he filed a motion for post conviction relief under Title 28, United States Code, Section 2255. The Honorable Fred Kunzel ordered the clerk of court to file a notice of appeal nunc pro-tunc as of May 12, 1965 [C.T. 46].

III

ERROR SPECIFIED

1. The trial court committed error in denying defendant's motion for judgment of acquittal.
2. The trial court committed error by its instructions and comments to the jury on the issue of custody and legal arrest.
3. The trial court committed error in failing to give defendant's requested instruction on the issue of custody.

IV

ARGUMENT

A. THE APPEAL IS NOT TIMELY.

On May 24, 1965, final judgment was entered, but sentence was pronounced on May 12, 1965. The record is not clear as to why final judgment was not entered until May 24, 1965, subsequent to sentencing.

Notice of appeal, without a showing of excusable neglect, would expire ten days later on June 3, 1965.

Upon a showing of excusable neglect, Federal Rule of Criminal Procedure 37(a)(2) extends the time an additional thirty days. Assuming excusable neglect, this would appear to extend the time to July 3, 1965.

The court has no power to extend the time beyond this date of July 3, 1965, regardless of the circumstances.

The first known communication concerning an appeal was a motion pursuant to Title 28, U.S.C., Section 2255, filed on December 19, 1966. Therefore, because failure to make an appeal within the time fixed by Rule 37(a)(2), Federal Rule of Criminal Procedure, is mandatory and jurisdictional, and, having been taken too late, the court is without authority to entertain the appeal.

United States v. Robinson, 361 U.S. 220, 224;

Banks v. United States, 240 F.2d 302 (9th Cir. 1957);

Marion v. United States, 171 F.2d 185, 186
(9th Cir. 1948), rehearing denied

January 28, 1949;

Crow v. United States, 203 F.2d 670, 672
(9th Cir. 1948).

The appeal is, therefore, not timely.

B. THE APPELLANT WAS IN CUSTODY PURSUANT TO LAWFUL ARREST, THEREFORE, IT FOLLOWS THAT:

FIRST: The trial court did not commit error in denying defendant's motion for judgment of acquittal.

SECOND: The trial court did not commit error by its instructions and comments to the jury on the issue of custody and legal arrest.

THIRD: The trial court did not commit error in failing to give defendant's requested instruction on the issue of custody.

Appellee agrees with the appellant's contention that custody arises pursuant to a lawful arrest. (Appellant's brief, page 9) Therefore, when it has been shown that one has been placed under lawful arrest, it has also been shown that the same person has been taken into custody.

It is clear that in the absence of an applicable federal statute, which specifically defines the requirement of an arrest, the law of the state where an arrest without a warrant takes place will determine its validity.

United States v. Di Re, 332 U.S. 581,
589 (1947)

California states the procedure for making an arrest in Penal Code Section 835:

"METHOD OF MAKING ARRESTS: AMOUNT OF RESTRAINT. An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention."

A submission to custody has been found, for purposes of arrest, in accord with California Penal Code, Section 835, when the evidence disclosed that a defendant-motorist stopped when he saw a police vehicle following him, alighted from his automobile, and was accused by the policemen of violating the California Vehicle Code. People v. Randolph (1957), 306 P.2d 98, 147 Cal. App. 2d 836. The court in Randolph noted that the defendant voluntarily stopped his automobile and that "the situation did not then indicate the necessity of further physical force or restraint for the purpose of actually taking the defendant into physical custody." The California court held that Randolph had been in custody for the purposes of the arrest statute, even though he had not been told that he was being placed under arrest. The facts of the instant case are stronger for finding arrest of appellant. Appellant was specifically told by a uniformed customs inspector that he was under arrest.

In People v. Martensen, 76 Cal. App. 763, the court found custody pursuant to a lawful arrest upon the following

facts: The defendant, stopped for speeding, refused to exhibit his operator's license, give his name, or in any manner reveal his identity. Thereupon, the officer advised the defendant that he was under arrest.

Appellant's liberty of movement was sufficiently restricted for the purpose of effecting an arrest. Appellant's immobility from the time that he was first told that he was under arrest until he put his car in motion certainly is evidence of custody pursuant to a lawful arrest. At the very least, appellant was in lawful custody during this time, pursuant to a lawful arrest.

Appellant attempted to escape by pushing away the arresting officer and attempting to drive away. The court held the defendant had been placed under arrest prior to being taken into "actual custody."

The California cases, cited by appellant, are distinguishable. They do not involve "custody" in terms of an arrest.

The case of People v. Drake, 162 Cal. 248, is concerned with an entirely different situation, that of custody as defined by Section 266(d) of the California Penal Code: ". . . placing in custody any female for the purpose of causing her to cohabit with any male to whom she is not married . . ."

Likewise, the case of People v. Crider, 76 Cal.

App. 101, involves a distinguishable set of facts; that is, custody where a prisoner is under the surveillance of prison guards. One does not have to be a prisoner to be in custody pursuant to lawful arrest.

People of State of California v. Maxwell, 125 F. Supp. 18, is distinguishable in that it involves the "custody" which results from a suspect, first arrested by the military authorities, subsequently being turned over to the civilian authorities.

Appellant contends that if he is found to have been in the custody of Inspector Yates, "he would be in lawful custody no matter where he might be in the United States." (Appellant's brief, page 12) However, appellant fails to recognize that one can be in lawful custody without being physically constrained. (See Randolph, supra.)

In Frazier v. United States, 339 F.2d 745, and in Giles v. United States, 157 F.2d 588, 591-2, dissenting opinions cited by appellant are distinguishable in that an arrest is not there involved.

In Henry v. United States, 361 U.S. 98, 103, cited in Plazola v. United States, 291 F.2d 56 (9th Cir. 1961), the court stated: ". . . the arrest took place when the federal agents stopped the car. That is the view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest,

for purposes of this case, was complete." It is noted that Henry was not told he was under arrest.

United States v. Person, 223 F. Supp. 982 (S.D. CAL, C.D., 1963), cited by appellant, is also distinguishable in that it is not an arrest case. In that case the defendant was not found to have been in custody when he breached the terms and conditions of "his authorized excursion" to visit his grandmother. It is obvious that when one is authorized to do an act his liberty of movement is not being restricted. Tennant was not authorized to depart the scene.

Appellant contends that before an arrest can be effected, the "arrestee" must understand that he is being detained for the purposes of an arrest (appellant's brief, page 10).

Jenkins v. United States, 161 F.2d 99, cited by appellant for the above proposition is distinguishable from this case. For, contrary to this case, Jenkins was not found to be under arrest because the purported "arrestor" had not communicated to the "arrestee" that he was under arrest. If the law were to require that every person understand he is under arrest in order for the "arrest" to be effective, it would be impossible to arrest a person who was so mentally incompetent or deranged that he could not understand that he was being placed under arrest. However, appellant was told he was under arrest.

Appellant contends that there must always be an intent on the part of one to arrest the other and an intent on the part of such other to submit. (Appellant's brief, page 10) Foreman v. Warden, 241 F. Supp. 161, 163-4, is cited erroneously by appellant for the above proposition. Foreman was asked to step out of a bar onto the street to speak to an officer, who told Foreman that he was suspected of burglary and asked him to come down to the police station. It was argued that Foreman was merely "accosted" on the street and was not arrested until after he was identified at the police station. The court held that "he was arrested on the street." In so holding, the court in Foreman chose not to follow Cornish v. State, 215 Md. 64, 67, 237 A.2d 170, 172 (1957), relied on by Foreman. Foreman was never told that he was under arrest. It is very unlikely that Foreman intended to submit to an arrest which he did not know and understand was taking place. Tennant knew he was under arrest, when he sped away.

Appellee contends that one neither has to submit or even understand that he is being placed under arrest. In Trimble v. United States, 369 F.2d 950, 951 (District Court of Columbia, 1966), it was stated: "His arrest occurred during his pursuit by the complaining witness, who shouted to an officer in the vicinity that the two men he was pursuing, who turned out to be Trimble and Johnson, had robbed him."



Inspector Yates did not need probable cause to arrest or search the appellant at the border. It is doubtful that the Inspector had probable cause since he only had a "feeling that there was some undeclared merchandise in the car." (Appellant's brief, page 4) The dissent in Gilliam v. United States, 189 F.2d 321, 327 (6th Cir. 1951), cited in Plazola v. United States, supra, at 60, states: "If officers do not have probable cause to arrest or search, their restraint of another's freedom of locomotion by words, acts or the like, which would induce reasonable apprehension that force would be used unless he submitted, constitutes an arrest. To constitute an arrest, it is not necessary to touch the person of one who is arrested, or to state to him that he is arrested. It is enough to constitute an arrest if the conduct of the officers operates on the will of the person threatened, and results in a reasonable fear of personal difficulty or personal injury." [Emphasis added.]

Following the Gilliam rationale, if all the attendant facts and circumstances are viewed most favorably to the government, there can be no question but that appellant was in custody pursuant to lawful arrest. The stopping of appellant's car, which remained still for some period of time, however brief, subsequent to notification of arrest, was a restraint upon appellant's freedom of locomotion. The notifying of appellant that he was under arrest put appellant

in fear that force would be used unless he submitted. That the conduct of Inspector Yates operated on the will of the appellant, there can be no question. Appellant raced off at high speed causing the Inspector to fall from the vehicle. Appellant, in fear of personal difficulties, left his passenger and companion, Mr. Trujillo, behind.

The Randolph case is cited with approval in Plazola, supra, at 60. In Plazola the court stated: "Again, we concede there may be a difference of opinion as to whether an arrest takes place when a siren is sounded, or at the instant a car is stopped, or not until there exists a restraint on the individual's liberty of movement." From this statement it is obvious that this is consequently a question for the jury to decide. Here the jury did in fact decide the question and such factual determinations should not be disturbed on appeal.

Once the trier of fact has returned a guilty verdict, the evidence must be viewed most favorably to the government, which includes indulgence in all permissible inference in its favor.

Glasser v. United States, 315 U.S. 60
(1942).

Stein v. United States, 337 F.2d 14
(9th Cir. 1964).

CONCLUSION

Appellee respectfully submits that appellant's conviction be sustained.

Respectfully submitted,


EDWIN L. MILLER, JR.
United States Attorney

SHELBY R. GOTT
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



SHELBY R. GOTT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

V.L. JOHNSON, d/b/a V.L. JOHNSON)
LUMBER CO.)
)
Appellant,)

vs.

No. 21998 ✓

CHICAGO, MILWAUKEE, ST. PAUL &)
PACIFIC RAILROAD CO.,)
)
Appellee,)

- - - - -
BRIEF OF APPELLANT
- - - - -

Appeal from the United States Court for
the District of Idaho, Northern Division.

HONORABLE RAY McNICHOLS

District Judge
- - - - -

McFADDEN & PARK
St. Maries, Idaho 83861
Attorneys for Appellants

SIDNEY E. SMITH
117 South Fourth Street
P.O. Box 1148
Coeur d'Alene, Idaho 83814

JAMES E. NELSON
609 White Building
Seattle, Washington 98101
Attorneys for Appellee

FILED

OCT 30 1967

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

V.L. JOHNSON, d/b/a V.L. JOHNSON)
LUMBER CO.)
)
Appellant,)

vs.

No. 21998

CHICAGO, MILWAUKEE, ST. PAUL &)
PACIFIC RAILROAD CO.,)
)
Appellee,)

- - - - -
BRIEF OF APPELLANT
- - - - -

Appeal from the United States Court for
the District of Idaho, Northern Division.

HONORABLE RAY McNICHOLS

District Judge
- - - - -

McFADDEN & PARK
St. Maries, Idaho 83861
Attorneys for Appellants

SIDNEY E. SMITH
117 South Fourth Street
P.O. Box 1148
Coeur d'Alene, Idaho 83814
JAMES E. NELSON
609 White Building
Seattle, Washington 98101
Attorneys for Appellee

SUBJECT INDEX OF APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	3
SPECIFICATION OF ERRORS	12
ARGUMENT OF THE CASE	13
<u>Summary of Argument</u>	13
<u>Proposition One</u> -- THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL	18
I. On a motion for involuntary dismissal at the close of plaintiff's case, or a motion for directed verdict, the motion should be granted only when reasonable men, in fair and impartial exercise of their judgment, could reach but one conclusion.	18
A. The plaintiff is entitled to the benefit of all reasonable inferences from the evidence	19
B. Issues that depend on credibility of witnesses or weight of evidence are for the jury.	19
II. Defendant, as a common carrier, owed a duty to plaintiff to furnish the transportation services which it offered by its tariffs.to perform	20
A. The legal duties of a common carrier at common law grow out of the public trust which	

the carrier takes upon itself and hence must be carried out for all members of the shipping public to the full extent of the trust.	21
B. The basic obligations of a common carrier at common law are to receive, carry and deliver all goods offered to him for transportation.	22
C. The terms and extent of the carriers obligation to receive property for transportation are determined by the "holding out", which is usually set forth in the carrier's published tariffs.	23
D. Since the basic obligation of the common carrier at common law arises out of the public nature of the carrier's business, it is independent of the contract of carriage.	24
E. A breach of the basic obligation of a common carrier constitutes a tort, and makes the carrier liable in damages to the shipper.	26
III. The carrier's common law duties have not been abridged or supplanted by the Interstate Commerce Act or by the Idaho constitution or statutes.	27
A. Part One of the Interstate Commerce Act preserves all common law rights and duties of carriers which are not absolutely inconsistent with specific provisions of the act.	27
B. The common law duties of carriers have not been limited or supplanted by Idaho law.	28
IV. Defendant established no legally sufficient excuse for its failure to provide service.	29

A. Defendant must prove objective impossibility which it could not have avoided and the exercise of the high diligence required by its public trust. . .	30
1. The liability of the carrier is not based on negligence but exists without fault, subject to exceptions which the law has come to recognize. .	30
2. The exceptions to common carrier liability are limited to cases where performance is prevented by circumstances over which the carrier had, and could have had, no control.	32
3. The common carrier may not escape the consequences of a default if its negligence has contributed to the existence or continuance of the obstruction preventing service.	33
a. The carrier is not excused if the interference could have been avoided by forethought.	33
b. The carrier is not excused unless the unavoidable interference was the sole cause of the default, unmixed with negligence.	35
c. The carrier is not excused unless he shows that the method of performance which is obstructed is the only possible method.	36
B. The diligence and care which the common carrier must exercise is the extreme diligence and care commensurate with its character and status as a public servant discharging a public trust. . .	37

V. There was evidence from which the jury could have found that defendant did not discharge its duty to provide transportation service to plaintiff, as required by the common law, the Interstate Commerce Act and Idaho statutes	39
A. Defendant did not prove objective impossibility of performance, and the evidence shows that no such impossibility existed.	41
B. Defendant did not prove that its negligence was not a contributing factor to the failure to serve. .	45
1. The tunnel failure could have been anticipated and avoided.	45
2. Defendant's negligence was a proximate cause of the closing of the tunnel.	47
3. Defendant failed to provide alternative or substitute service during the emergency. . . .	55
C. Defendant did not prove that it exercised the extreme diligence and care with which it was charged.	56
1. Defendant failed to take necessary corrective measures at a time when disruption of service could have been avoided.	57
2. Defendant did not prepare in advance for the anticipated collapse of the tunnel so as to reduce the duration of the suspension of service .	58
3. Defendant did not reinstate the service as promptly as possible	59

a. Defendant elected to defer repairs pending agreement with the State of Idaho. 60

b. By deferring repairs until agreement was reached with the State, defendant realized a substantial saving to plaintiff's great loss . . 61

4. Defendant failed even to give plaintiff reliable information regarding the probable duration of the suspension of service. 62

D. Defendant's abandonment of service for an extended period without I.C.C. authority subjects it to liability. 64

Proposition Two -- THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF HAD FAILED TO PROVE ANY DAMAGES WITH SUFFICIENT CERTAINTY. 66

I. If an injury resulting in damages is shown, the amount of damages is a jury question and need not be shown with exact precision. 67

A. Proof of the extent of damages need not be made with the certainty required in proving the liability for damages. 68

II. The rules applicable to proof of damages in the present case are liberal ones. 69

A. To avoid involuntary dismissal, plaintiff need show only that he has been subjected to some damage as a result of defendant's conduct . . . 70

B. The rule of damages to establish lost profits is a liberal one. 70

III. No speculation or conjecture by the jury is

required to determine plaintiff's damages herein . . .	71
<u>Proposition Three</u> -- THE TRIAL COURT ERRED IN REFUSING TO	
PERMIT PLAINTIFF TO REOPEN HIS CASE TO SUBMIT FURTHER	
EVIDENCE THE COURT DEEMED ESSENTIAL TO RECOVERY.	73
I. It is common practice to permit reopening and	
submission of additional evidence after motion for	
involuntary dismissal.	73
II. The trial court should grant a motion to	
reopen to receive evidence necessary to the proper	
disposition of the case, especially when no delay	
or inconvenience will result	74
CONCLUSION	75

TABLE OF AUTHORITIES

CASES

Adams Exp. Co. v. Croninger (1913) 226 US 491, 33 S Ct 148 . .	31
American Trucking Assn. v. Atchison, T.&S.F. Ry. Co., (1967) __US__, 87 S Ct 1608	38
Application of Omaha Transit Co. (Neb.) 94 NW 2d 461	57
Application of U.P.RR. Co., 64 Idaho 597, 134 P 2d 1073. . . .	64
B. & O. R. Co. v. O'Donnell, 49 Oh St 489, 32 NE 476 . .	37, 43
Baker v. St. L. etc. R. Co. (1910) 145 Mo App 189, 129 SW 436.	34
Boise Street Car Co. v. Van Avery, 61 Idaho 502, 103 P2d 1107.	67
Bell Lumber Co. v. Bayfield Transfer Ry. Co., (Wis) 172 NW 955	35
Black v. City of Lewiston, (1887) 2 Idaho 276, 13 Pac. 80. . .	19
Bigelow v. R.K.O. Radio Pictures, Inc. (1946) 327 US 251, 66 S Ct 574.	68
Brink's, Inc. v. Hoyt (1950, CA-9) 179 F2d 355	68

Brotherhodd of Railway, etc. Employees v. Florida East Coast Ry. Co. (1966) 348 US 238, 86 S Ct 1420.	22
C.B. & Q. R. Co. v. Manning, (1888) 23 Neb. 352, 37 NW 462.	34, 37
C. & E. I. R. Co., v. Collins Produce Co. (1919) 249 US 186 39 S Ct 189.	38
C. R. I. & P. Ry. Co. v. Dawson (1923) 157 Ark. 484, 248 SW 558	37
Coggs v. Bernard (1703) 2 Ld. Raymond 909, 92 Eng. Rep. 107.	30
Conley v. Amalgamated Sugar Co., 74 Idaho 416, 263 P.2d 705.	72
Graham v. Atchison, T. & S.F. Ry. Co., (1949, CA-9) 176 F2d 819	19
Hannibal & St. Joseph Ry. v. Swift, (1871) 12 Wall (79 US) 262, 20 L ed 423	25, 43
Kingston v. McGrath, (CA, Idaho, 1956) 232 F 2d 495.	20, 70
Layne v. Cotton (1701) 1 Ld. Raymond 646, 91 Eng. Rep. 1332.	21
Lehigh Valley R. Co. v. Allied Machinery Co. of America, (1921) 271 Fed 900, Cert den. 256 US 407, 41 S Ct 625.	36
McAlinden v. St. Maries Hospital Assn., 28 Idaho 657, 156 Pac. 115	19
Michigan Consolidated Gas Co. v. F.P.C. (CA DC, 1960) 283 F.2d 204	38, 64
Minn. & St. L. Ry. Co. v. Pacific-Gamble Robinson Co., (CA, Minn.) 215 F.2d 126	38
Missouri Pacific Ry. Co. v. Elmore & Stahl, 377 US 134, 84 S Ct 1142	30
Montgomery Ward & Co. v. Northern Pacific Terminal Co., (1953) 128 F Supp 475.	32
Muldow v. Daly (DC App, 1964) 329 F.2d 886	19
N.Y.C. RR. Co. v. Lockwood (1873) 17 Wall (84 US) 357, 21 L. ed 627	38
New Jersey Steam Nav. Co. v. Merchants Bank (1848) 6 How. (47 US) 344, 12 L ed 265	29, 30, 32
Owen Bros. v. C.R.I. & P. Ry. Co. (1908) 139 Iowa 538, 117 NW 762	26
Penn. R.R. Co. v. Olivita Bros., 243 US 574, 37 S Ct 468	33
Penn. R.R. Co. v. Puritan Coal Co. (1915) 237 US 131,	27

Penn. R.R. Co. v. Sonman Shaft Coal Co. (1916) 242 US 120, 37 S Ct 46	28
Schnee v. So. Pacific Co. (CA-9, 1951) 186 F.2d 745.	19
Secretary of Agriculture v. U.S. (I.C.C.) 350 US 162, 76 S Ct 244.	30, 31
Shrum v. Wakimoto, 70 Idaho 252, 215 P.2d 991.	67
Spokane Merchants Assn v. Olmstead, 80 Idaho 166, 327 P2d 385.	74
State of Washington v. Kuykendall (1927) 275 US 207, 48 S Ct 41	24
Story Parchment Co. v. Paterson Parchment Paper Co. (1931) 282 US 555, 51 S Ct 248.	68
Swayne & Hoyt v. Everett (1919, CCA-9) 255 Fed 71.	29,30,33
The Niagara v. Cordes (1859) 21 How. (62 US) 7, 16 L ed 41	23
Turner v. Atlantic Coast Line R. Co. (CA,Ga, 1961) 292 F2d 586	18
U. S. Express Co. v. Kountze Bros. (1869) 8 Wall (75 US) 342, 19 L ed 457	33,34
Union Wire Rope Corp. v. A.T. & S.F. Ry Co. (1933, CCA-8) 66 F.2d 965, cert. den. 290 US 686	24
Virginia Ry. v. Federation, 300 US 515, 57 S Ct 592.	2
Wabash Railroad Company v. Pearce (1904) 192 US 179, 24 S Ct 231.	23
Western Feed Co. v. Heidloff, 230 Ore 324, 370 P 2d 612.	71
Wilkerson v. McCarthy, (1949) 336 US 53, 69 S Ct 413	20
Williams v. Bone, 74 Idaho 185, 259 P2d 810.	67
Wray M. Scott v. Daigle (1962, CA-Neb) 309 F 2d 105.	19
York Mfg. Co. v. I.C. Ry. Co. (1866) 3 Wall (70 US) 107, 18 L ed 170.	23

STATUTES

Idaho Code:

§ 61-307	64
§ 62-402	28
§ 62-403	28

STATUTES (Cont'd)

United States Code Annotated

28 USCA 1291	2
28 USCA 1332	1, 2
28 USCA 1441	1
49 USCA 1 (15)	65
49 USCA 1 (18)	64, 65
49 USCA 22	27

MISCELLANEOUS

Corpus Juris Secundum

13 CJS, <u>Carriers</u> , § 123 b., p. 237	25
25 A CJS, <u>Damages</u> § 176, p. 168	70
88 CJS, <u>Trials</u> , § 108, p. 225.	74
Kent, "Commentaries" (14th Ed.) Vol. II, p. 602.	31
Restatement of Torts, Sec. 866	26
Ruling Case Law, Vol. IV, p. 660	25

JURISDICTIONAL STATEMENT

This action was filed by appellant, as plaintiff, in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Benewah (Rec. p. 12) Service was obtained by summons issued out of that court, on September 29, 1966. (Rec. p. 9)

Respondent, as defendant, filed its petition for removal to the United States District Court for the District of Idaho, Northern Division, on October 17, 1966 (Rec. p. 6 - 8), together with its bond for removal (Rec. p. 15), notice of filing thereof (Rec. p. 19) and affidavit of mailing (Rec. p. 17).

The basis of original jurisdiction of the District Court and of the petition for removal was diversity of citizenship under Title 28, United States Code, § 1332.

Plaintiff did not contest the removal.

Plaintiff is a resident of the State of Idaho (Rec. p. 10), and under 28 U.S.C. §1332 (c) defendant is a citizen of the State of Wisconsin, by reason of its incorporation under the laws of that state (Rec. p. 7). The amount in controversy in this action exceeds \$10,000, exclusive of interest and costs, being \$30,500 under plaintiff's first and second causes of action and \$25,500 under plaintiff's third cause of action. (Rec. p. 10 - 14)

Removal was sought and obtained under Title 28 United States Code § 1441 (a), the case being one of which the United States District Court for the District of Idaho,

Northern Division, had original jurisdiction, as aforesaid, under 28 U.S.C. §1332.

The District Court's order of involuntary dismissal having been entered with prejudice, the decision appealed from herein was a final decision (Rec. p. 79). Accordingly, this court has jurisdiction of the appeal under the provisions of 28 United States Code §1291.

STATEMENT OF THE CASE

This is an action for damages sought by the plaintiff, V. L. Johnson, from the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, on three alternative claims, each of them based on defendant's failure to provide freight service from plaintiff's sawmill at Elk River, Idaho in violation of its duty as a common carrier under common law and under Federal and Idaho statutes. (Rec. p. 10-14)

From 1963 through 1966 plaintiff was the owner and operator of a sawmill at Elk River, Idaho. During this period he shipped substantial quantities of lumber in interstate commerce over defendant's railroad line. All of his production except ten or eleven percent was transported in this manner to markets outside the State of Idaho.

(Tr. p. 3, l. 18 - p. 4, l. 6)

Elk River is located twenty miles from the nearest paved road and fifty miles from the nearest major highway. Defendant is the only rail carrier serving Elk River and the only common carrier hauling lumber from Elk River.

(Tr. p. 4, l. 24 - p. 6, l. 11) Defendant's railroad line runs from Elk River -- the southern terminus of the line -- to St. Maries, Idaho, where it connects with defendant's main line. (Tr. p. 5, l. 18 - 24)

Until 1966, this line passed through a tunnel, known as the Neva Tunnel, at a point between Elk River and

the next station to the north -- Bovill, Idaho. In April, 1966, a partial cave-in or blockage of this tunnel caused the temporary suspension of rail service in and out of Elk River. This blockage was cleared within a few days and service was restored. (Tr. p. 69, l. 2 - 19) On about May 12, after an inspection of the tunnel, service was discontinued without any prior notice to plaintiff, and was not restored until about October 17, 1966, subsequent to the filing of this action. (Tr. p. 70, l. 19 - p. 75, l. 16; P. Ex. 12)

No order of the Interstate Commerce Commission or the Idaho Public Utilities Commission was obtained at any time authorizing such suspension of service or declaring an embargo upon shipments in or out of Elk River. (Tr. p. 114, l. 4-19)

As will be more fully developed in a subsequent portion of this brief, maintenance of the tunnel had, for several years, been on a temporary or "stop-gap" basis. (Tr. p. 51, l. 21 - p.52, l. 23; Tr. P. 140, l. 17- p.141, l.3) Inspections of the tunnel in 1964 showed it to be in bad condition and deteriorating. (Tr. p. 53, l. 15 - p.54, l.22; p. 55, l. 1 - l. 19) The necessity for substantial work on the tunnel in 1964 was recognized by defendant, but the work was not performed in 1964 nor in 1965. (DAP 1-6, Rec. 49-50; Tr. p. 50, l. 16 - p. 51, l. 5.)

During 1955 and 1956, defendant was negotiating with the Idaho Department of Highways in an effort to persuade the Highway Department to bear the major part of the

cost of "daylighting" the tunnel, with the resulting cut to be used for the relocation of state highway in that area as well as for the railroad. (P.Ex. 5, 6; Tr. p.44, l. 19 - p. 45, l.7.)

The joint project continued under "rather desultory consideration" (P. Ex. 11) for several years, and in December, 1965, the State proposed further negotiations, (Tr. p. 59, l. 4 - 24) but defendant did not respond to the State's overtures until after the cave-in of the tunnel. (P. Ex. 15; Tr. p. 86, l. 9 - 17.)

Between defendant's condemnation of the tunnel on May 12, 1966, and solicitation of bids on July 22, 1966, defendant studied the economics of the situation and negotiated with the Idaho Department of Highways, (Tr. p. 93, l. 5 - 17; P. Ex. 15.) resulting in an agreement under the terms of which the State ultimately paid about \$69,000 of the approximately \$180,000 total cost of the daylighting project. (Tr. p. 94, l. 11 - 24.)

Pursuant to solicitation of bids in late July, defendant entered into a contract dated August 17, 1966, with Morrison-Knudsen Company for the replacing of the tunnel with a cut. The contractor commenced work about August 29 and the job was completed about October 14. (Tr. p. 93, l. 10 - p. 94, l. 2)

At the time of the termination of service, on May 12, plaintiff had one car of lumber loaded and awaiting shipment from Elk River. (Tr. p. 6, l. 22 - p. 7, l. 21) The bill of lading on this car was accepted by defendant's

agent in Plummer, Idaho, who had apparently not been advised that service in and out of Elk River was suspended. (Tr. p. 152, l. 25 - p. 153, l. 11) Thereafter defendant unloaded this car and trucked the lumber to Bovill for reloading and shipment on its line from that point. (Tr. p. 154, l.22 - p. 155, l. 1) Plaintiff's later requests for further service on this basis were refused. (Tr. p. 167, l. 4 - 18)

Shortly after the termination of service, plaintiff inquired about the probable duration of the suspension but defendant would not or could not tell him. (Tr. p. 134, l. 15 - p. 136, l.6)

In response to further inquiries, he was advised that service would be restored about July 15. (Tr. p. 9, l. 4 - 16) When this date passed without action, he was unable to obtain any reliable information about the matter until September 1 when his attorneys, in response to a letter written by them August 9, received a letter from defendant dated August 30, stating that the service was expected to be restored by the middle of October. (P. Ex. 2)

During the time the service was suspended -- which embraced almost the entire operating season for plaintiff at Elk River -- plaintiff was forced to curtail his lumber production drastically. (Tr. p. 4, l. 7 - 13; p. 10, l. 16 - 23) He hauled a few carloads of lumber by truck to Bovill for rail shipment from that point, but this method of operation was not economically feasible for several reasons: plaintiff did not have the proper truck for the job; there were no loading facilities at Bovill, and plaintiff did not

have a loader which he could leave in Bovill; in addition to hauling the lumber and the double loading, plaintiff had to transport his lift truck back and forth between Elk River and Bovill -- nearly 20 miles each way -- with each load of lumber. (Tr. p. 10, l. 24 - p. 11, l. 17) Defendant was requested to provide temporary alternative service to plaintiff and the only other carload shipper in Elk River, in the form of truck service to Bovill or provision of loading facilities or both. (Tr. p. 10, l. 3 - 15; p. 167, l. 11 - 18) Defendant refused, however, on the ground that I. C. C. regulations prohibited any such service. (Tr. p. 167, l. 19 - p. 168, l. 1; P. Ex. 3)

Plaintiff also shipped a small amount of lumber by truck to consumers in Denver, but the increased transportation cost and lower price in that market made such operations unprofitable. (Tr. p. 11, l. 18 - 25) Plaintiff was unable to arrange trucking to his regular customers in the East and Midwest at any figure. (Tr. p. 27, l. 9 - p. 29, l. 5)

In May of 1966, when the service was terminated, and for several weeks thereafter, the price of lumber of the type and species produced by plaintiff was at or near record levels. By October 15, when service was restored, the price had fallen sharply and was approaching record lows. (Tr. p. 176, l. 8 - p. 177, l. 23) Moreover, by this date the operating season was almost at an end. (Tr. p. 19, l. 2-14)

As a direct result of plaintiff's greatly reduced sales and increased transportation costs, which were caused by the suspension of freight service by defendant, plaintiff's

operations in 1966 resulted in an adjusted net loss of \$21,210.46 (P. Ex. 20; Tr. p. 161, l. 8 - p. 162, l. 3) compared to net profit in 1965 of \$5,346.80 (P. Ex. 19).

During 1966, due to a better market, better facilities, and higher opening inventory, plaintiff had reason to anticipate a more profitable year than in 1965, but for his inability to ship his lumber. (Tr. p. 162, l. 4 - 27.)

By its answer to plaintiff's complaint, defendant admitted that "on or about May 13, 1966, a tunnel caved in on the railroad line of defendant between Bovill, Idaho and Elk River, Idaho, resulting in the temporary suspension of rail service to and from Elk River, Idaho." The answer generally denied the other allegations of the complaint, except as to residence, plaintiff's business, and his utilization of the railroad's service prior to May 13, 1966. (Rec. p. 26 - 28) As an affirmative defense, defendant also alleged that the cave-in "was not caused by any act, omission or negligence of the defendant, but was proximately caused by an act of God."

At the close of plaintiff's case, the defendant moved for an involuntary dismissal. After hearing arguments of counsel, the trial court granted defendant's motion, making the following observations:

"As I see the posture of the case, there are three principal issues. First, is the matter of negligence on the part of the plaintiff in the maintenance of the Neva tunnel and whether or not the necessity for the closing of the tunnel was proximately caused by any

such negligence.

"Secondly, assuming maintenance negligence was not the cause of the closing and that the defendant was not liable on this reason, did the defendant proceed reasonably to reinstate the service. Or failing to proceed, was the defendant liable to the plaintiff for damages and I am sure that they had the obligation once the tunnel was closed to act reasonably and properly to reinstate the service as soon as feasible.

"The third issue is has the plaintiff proved damages with sufficient specificity to entitle the plaintiff to have that issue to go to the jury.

"On the first issue I find that the closing of the tunnel is unquestionably shown to have been caused by an unusual massive movement of earth and not through negligent maintenance of the structure. I feel as a matter of law reasonable minds would not differ on this question and on this issue I should remove the issue from the jury's consideration.

"On the second issue the evidence is that there were three possible methods of reopening the tunnel -- wooden shoring, cement shoring and open cutting. Each of these would cause a considerable lapse of time in each instance in excess of three months. Cement or open cutting was far preferable. These would take some five months.

"I feel as a matter of law that reasonable minds

could not differ and that the railroad acted reasonably in the procedure followed to reinstate the rail service. This issue too should be removed from jury consideration.

"Assuming arguendo that I may be in error in either of the first two determinations, there is still the question of damages. Damages must be proved by the plaintiff with sufficient certainty that a jury can set the damages by some reasonable measure and not have to resort to speculation or conjecture.

"Here the only evidence is that in 1965 in operating the sawmill plaintiff made some \$5,000 profit on his mill operation, and in 1966 he lost \$21,000. He states that the loss was due solely to the impossibility of shipping. He shows by testimony through an expert that the market was good in May of 1966 and bad by October, with a constant falling off. There was no showing of the prior year's profit, that is prior to 1965 to show a pattern. No factors such as carry-over of inventory are shown. No breakdown of profits by carloads and the numbers of cars not shipped is offered. Such evidence should at least be reasonably within the ability of the party to show it, and if they do not the indication is, of course, that evidence would be unfavorable to the plaintiff.

"In order to arrive at a judgment in this matter the jury would, in my opinion, have to speculate to bring in a damage verdict. The evidence is not sufficient and the plaintiff has failed in his burden of proving damages with sufficient certainty.

"The defendant's motion of involuntary dismissal is granted." (Tr. p. 182, l. 10 - p. 184, l. 22)

Plaintiff immediately moved to reopen for the purpose of presenting additional evidence on the issue of damages. This motion was denied by the trial court without comment. (Tr. p. 185)

On this appeal, plaintiff respectfully contends that the trial court misinterpreted the law applicable to the obligations of common carriers to shippers, basing its decision on a finding that defendant, as a matter of law, was conclusively shown to be free of negligence. Moreover plaintiff contends that the court erred in its factual determinations also, for there was ample evidence from which the jury might reasonably have found defendant guilty of negligence if that were the issue.

Plaintiff further contends that the trial court erred in finding no evidence upon which the jury could predicate an award of damages, for we submit that the evidence on this issue met fully the applicable standards.

Finally, if the evidence on the issue of damages was insufficient, plaintiff contends that the trial court should have granted the motion to reopen in order to submit further evidence on this issue.

SPECIFICATION OF ERRORS

The trial court erred in granting defendant's motion for involuntary dismissal.

The trial court erred in holding that defendant's liability for failure to provide service depended on whether or not the necessity for the closing of the tunnel was proximately caused by defendant's negligence.

The trial court erred in holding, as a matter of law, that the closing of the tunnel was unquestionably not the result of defendant's negligence.

The trial court erred in holding, as a matter of law, that the defendant acted reasonably with respect to reinstatement of the service.

The trial court erred in holding, as a matter of law, that there was not sufficient evidence to permit the jury to award any damages.

The trial court erred in denying plaintiff's motion to reopen for the purpose of submitting additional evidence which the court deemed essential to recovery.

ARGUMENT OF THE CASE

Summary of Argument

Plaintiff sued defendant to recover the substantial damages which he sustained as a result of defendant's refusal to accept, carry and deliver the product of his sawmill. At the close of plaintiff's case, the trial court granted defendant's motion for involuntary dismissal, primarily on the ground that no negligence on the part of the railroad had been shown.

In so doing, we believe the trial court erred by holding defendant to an improper standard of care by disregarding the true nature and extent of the obligations which defendant owed to plaintiff, and by failing to recognize that, judged even by the usual standard of the reasonable man, the jury would have been justified in finding defendant guilty of negligence.

As a common carrier, defendant owed plaintiff a duty to receive, carry and deliver his lumber in accordance with its published tariffs. But from May 13 to October 17, 1966 defendant refused to discharge this duty to plaintiff, even though its tariffs remained in effect without change throughout this period.

The evidence introduced in the course of plaintiff's case in chief showed that the reason for defendant's failure to serve was because defendant had closed a tunnel on its line between Elk River -- where plaintiff's mill is located --

and Bovill, some twenty miles distant. Defendant's line was the only railroad in or out of Elk River, an isolated town which is twenty miles from the nearest paved road.

Defendant closed the tunnel in April after a cave-in partially blocked it, but it was re-opened in a few days. On May 12, after an inspection which disclosed that the tunnel lining was deteriorating rapidly, defendant closed it again. The trial court found that the closing was "unquestionably shown to have been caused by an unusual massive movement of earth and not through negligent maintenance of the structure." There was ample evidence, however, that defendant had ignored the recommendations of its own engineers with respect to permanent improvement of the tunnel and had failed to perform even the annual maintenance work recognized by its own employees as necessary. Moreover, there was evidence from which the jury might have found that the "unusual massive movement of earth" was nothing more than the usual and anticipated action of natural forces upon a structure which had been permitted to deteriorate seriously.

Certainly, the evidence did not establish, as a matter of law, that defendant's failure to serve resulted from an act of God or from any other legally sufficient excuse.

Even if it were assumed that defendant proved, beyond reasonable dispute, that its failure to provide service was due to impossibility, resulting from circumstances which it could not have anticipated and which were completely beyond its control, we contend that involuntary dismissal

and Bovill, some twenty miles distant. Defendant's line was the only railroad in or out of Elk River, an isolated town which is twenty miles from the nearest paved road.

Defendant closed the tunnel in April after a cave-in partially blocked it, but it was re-opened in a few days. On May 12, after an inspection which disclosed that the tunnel lining was deteriorating rapidly, defendant closed it again. The trial court found that the closing was "unquestionably shown to have been caused by an unusual massive movement of earth and not through negligent maintenance of the structure." There was ample evidence, however, that defendant had ignored the recommendations of its own engineers with respect to permanent improvement of the tunnel and had failed to perform even the annual maintenance work recognized by its own employees as necessary. Moreover, there was evidence from which the jury might have found that the "unusual massive movement of earth" was nothing more than the usual and anticipated action of natural forces upon a structure which had been permitted to deteriorate seriously.

Certainly, the evidence did not establish, as a matter of law, that defendant's failure to serve resulted from an act of God or from any other legally sufficient excuse.

Even if it were assumed that defendant proved, beyond reasonable dispute, that its failure to provide service was due to impossibility, resulting from circumstances which it could not have anticipated and which were completely beyond its control, we contend that involuntary dismissal

should not have been granted. For there was uncontradicted evidence from which the jury might reasonably have found that defendant failed to discharge its duty to plaintiff and the public in a number of ways:

(a) By failing to make permanent improvements to the tunnel as recommended by its own engineers, at a time when this could have been done without disrupting freight service; (b) By failing to plan in advance for the daylighting or cement lining of the tunnel, which it knew would be required, as a result of which the duration of the suspension was greatly extended; (c) By deferring the letting of a contract for the daylighting job until negotiations with the State of Idaho were concluded; (d) By failing to provide plaintiff with alternative service, either by hauling his lumber by truck from Elr River to Bovill or, at the very least, by providing loading facilities and equipment at Bovill; and (e) By misinforming and failing to inform plaintiff as to the probable duration of the suspension.

We contend that defendant, as a common carrier, was bound to a high degree of diligence and care and that the jury might well have found that it failed to discharge this duty in a number of ways, all of which subjected the plaintiff to serious loss.

Defendant may well have proved that it satisfied the standards of a reasonably prudent businessman -- though not as a matter of law. Its actions were consistent with its economic self-interest; by delaying the repair of the tunnel and reinstatement of service until the State of Idaho had been

persuaded to share in the cost, defendant saved itself \$69,000. Unfortunately, however, it caused plaintiff a \$30,000 loss by doing so. But whether or not defendant was guilty of ordinary negligence, there is no basis for doubt that defendant's conduct fell far short of the utmost good faith and fairness required of common carriers.

We contend also that the trial court erred in holding that plaintiff failed to prove sufficient evidence of his loss from which the jury could reasonably have awarded any damages. Plaintiff proved his receipts, expenditures, inventories, profit, etc. in 1965 and 1966. The proof showed that he earned a \$5,000-plus profit in 1965 and suffered a \$21,000 loss in 1966, even though market conditions in 1966 were better than in 1965 and even though he was in a position -- by reason of better facilities and larger inventory -- to increase his production in 1966 over 1965, but for his inability to ship his product. Plaintiff testified that the drastic reduction in his gross receipts and net earnings was due solely to this cause, and defendant offered no evidence whatever to the contrary.

Finally we contend that if, indeed, plaintiff had not offered sufficient evidence to justify any damage award, the motion to re-open for the purpose of submitting additional evidence on this issue should have been granted. The motion was made immediately after the court's ruling; it would have involved no delay or inconvenience for the court or counsel for defendant; no surprise was involved, of course, and defendant would certainly not have been prejudiced.

For the foregoing reasons and others, set forth and developed more fully in the following argument, the judgment of involuntary dismissal should be set aside and a new trial ordered.

ARGUMENT OF THE CASE

Proposition One -- THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL.

At the close of plaintiff's affirmative case, counsel for defendant moved for dismissal, upon grounds which, if stated, do not appear in the record. After hearing arguments the trial court granted the motion and entered its order for involuntary dismissal, with prejudice, based on the court's conclusion "that the plaintiff had failed to prove his right to recover from defendant as a matter of law...."

In so doing, we respectfully submit that the trial court misconstrued the applicable law and misinterpreted the evidence, in a number of respects, as we shall attempt to show in the following argument.

On a motion for involuntary dismissal at the close of plaintiff's case, or a motion for directed verdict, the motion should be granted only when reasonable men, in fair and impartial exercise of their judgment, could reach but one conclusion.

A motion for involuntary dismissal -- or, more appropriately, a motion for directed verdict, in a jury case -- may be granted only when there is no evidence which, if believed, could authorize a verdict against the moving party. Turner v. Atlantic Coast Line R. Co., (C.A. Ga., 1961) 292 F. 2d 586. Or as another Court of Appeals has stated it, only when all the evidence is on one side or so overwhelmingly on one side as to

leave no doubt what the fact is. Wray M. Scott Co. v. Daigle, (C.A. Neb., 1962) 309 F. 2d 105. Unless the trial judge could properly determine that no reasonable man could reach a verdict in plaintiff's favor, the judge is bound to submit the question to the jury. Muldow v. Daly, (D.C. App., 1964) 329 F. 2d 886.

A. The plaintiff is entitled to all reasonable inferences from the evidence.

As this Court stated in Kingston v. McGrath, (CA, Idaho 1956) 232 F. 2d 495, 54 ALR 2d 267:

"Upon appeal from a judgment of dismissal entered upon the close of a plaintiff's case-in-chief, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the claim or cause of action asserted. Gunning v. Cooley, 1930, 281 US 90, 94, 50 S Ct 231, 74 L ed 720; Schnee v. Southern Pacific Co., 9 Cir, 1951, 186 F2d 745, 746; Graham v. Atchison, T. & S.F. Ry. Co., 9 Cir, 1949, 176 F2d 819, 823; McAlinden v. St. Maries Hospital Ass'n, 1916, 28 Idaho 657, 666, 156 P 115, 117; Black v. City of Lewiston, 1887, 2 Idaho 276, 281, 13 P. 80, 82."

B. Issues that depend on credibility of witnesses or weight of evidence are for the jury.

The Supreme Court observed in Gunning v. Cooley, supra, that:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury.... Where uncertainty as to the existence of negli-

gence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." 281 US at 94, 50 S Ct at 233; quoted by this Court in Kingston v. McGrath, supra.

In the Kingston case, this Court also held:

"As said in Wilkerson v. McCarthy, 1949, 336 US 53, 57, 69 S Ct 413, 415, 93 L ed 497: 'It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case. . . .'"

Applying these well-recognized general principles to the circumstances of this case and the evidence presented, we submit that the Court will readily see that reasonable minds might well have differed from the trial court on the issue of defendant's liability and that the evidence presented, with reasonable inferences therefrom favorable to plaintiff, would have supported a verdict in favor of plaintiff for the full amount of his claim.

II. Defendant, as a common carrier, owed a duty to plaintiff to furnish the transportation services which it offered by its tariffs to perform.

We are reluctant to restate, in some detail, what we believe to be rather obvious hornbook law. However, since the trial court's remarks upon granting defendant's motion for involuntary dismissal seem to indicate that the court regarded this

as an ordinary negligence case, we feel it is incumbent upon us to explore the obligations of common carriers rather thoroughly, in order to show that it is not.

A. The legal duties of a common carrier at common law grow out of the public trust which the carrier takes upon itself and hence must be carried out for all members of the shipping public to the full extent of the trust.

The common law duties of a common carrier derive from the public nature of the carrier's calling, as recognized for more than 250 years. This was pointed out by Chief Justice Holt in Layne v. Cotton (1701) 1 Ld. Raymond 646, 91 Eng.Rep. 1332:

"If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an inn-keeper refusing a guest, when he has room, against a carrier refusing to carry goods, when he has convenience, his wagon not being full. . . ." (Emphasis supplied)

The Supreme Court has long recognized the public nature of the carrier's duty also:

"He [the common carrier] is in the exercise of a sort of public office, and has public duties to perform.***He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal." New Jersey Steam Nav. Co. v. Merchants' Bank (1848) 6 How. (47 U.S.) 344 at pp. 382-383, 12 L. Ed. 465 at p. 482.

The public service aspects of the carrier's business were again recognized in the recent decision of the Supreme Court in Brotherhood of Railway, etc. Employees v. Florida East Coast Railway Co. (1966) 348 US 238, 16 L ed 2d 501, 86 S Ct 1420, in which it was said:

"The carrier's right of self-help is underlined by the public service aspects of its business. 'More is involved than the settlement of a private controversy without appreciable consequences to the public.' Virginia Ry. v. Federation, 300 US 515, 552, 81 L ed 789,802, 57 S Ct 592. The Interstate Commerce Act, 24 Stat. 379, as amended, places a responsibility on common carriers by rail to provide transportation. The duty runs not to shippers alone but to the public. . . .

"We emphasize these aspects of the problem not to say that the carrier's duty to operate is absolute but only to emphasize that it owes the public reasonable efforts to maintain public service at all times, even when beset by labor management controversies. . . ."

B. The basic obligations of a common carrier at common law are to receive, carry, and deliver all goods offered to him for transportation.

The Supreme Court has stated this basic duty of a common carrier in the following passages, among others:

"It is unnecessary to cite authorities to the proposition that it is the common law duty of the carrier to receive, carry,

and deliver goods.***" Wabash Railroad Company v. Pearce (1904)
192 U.S. 179 at p. 187, 24 S. Ct. 231 at p. 233. (Emphasis supp.)

"A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." The Niagara v. Cordes (1859) 21 How. (62 U.S.) 7, at p. 22, 16 L. Ed. 41, at p. 46.

"He [the common carrier] is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal." York Mfg. Co. v. I.C.Ry. Co. (1866) 3 Wall. (70 U.S.) 107 at p. 112, 18 L. Ed. 170, at p. 172.

C. The terms and extent of the carrier's obligation to receive property for transportation are determined by the "holding out", which is usually set forth in the carrier's published tariffs.

What the carrier holds itself out to do can be determined from its customary practices or from the services which the carrier advertises to the public that it is willing to perform. Since the adoption of the Interstate Commerce Act and other regulatory statutes requiring common carriers to publish and adhere to tariffs, the usual means of determining what the carrier holds itself out to do is to look in the tariffs.

The Supreme Court has stated it thus:

"The Shively Company stands the same as the other parties to the tariff. It was engaged in the general towboat business; it towed logs for others as well as for relator; it held itself out as a common carrier in that line of business and by the tariff gave public notice to that effect." State of Washington v. Kuykendall (1927) 275 US 207 at p. 212, 48 S Ct 41, at p. 42. (Emphasis supplied)

The nature and significance of the tariff has also been described thus:

"A rate tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price. When a tariff has become legally promulgated, it is binding upon both the carrier and any shipper taking advantage of it." Union Wire Rope Corp. v. A. T. & S. F. Ry. Co. (CCA 8th, 1933) 66 F.2d 965 at 966-967, cert. den. 290 US 686.

Throughout the period from May 12 through October 17, 1966, during which defendant was refusing plaintiff's requests and demands for transportation service, defendant continued, by its published tariff, to hold itself out to furnish the services which plaintiff required. (Tran. p. 121, l. 6-19)

D. Since the basic obligation of the common carrier at common law arises out of the public nature of the carrier's business, it is independent of the contract of carriage.

No bill of lading or other contract between the shipper and the carrier is necessary to subject the carrier to liability for failure to perform its common law duty, for

the carrier's obligation is not merely to carry and deliver goods for which it has issued a special contract, but is to receive, carry and deliver all goods which it holds itself out as transporting. The common law rule is well summarized in 4 Ruling Case Law, p. 660, as follows:

"No special contract with a common carrier is required to subject him to all legal liabilities as such to the person applying, because the undertaking of a common carrier is general and embraces every one in the community, and to make it particular as an undertaking with a single individual it is only necessary that he should apply to the carrier, with such goods as the latter has undertaken to transport, in condition to be transported, at the place designated." (Emphasis supplied)

A comparable rule is stated in 13 C.J.S., Carriers Sec. 123b, p. 237 as follows:

"It is the duty of the carrier to issue a proper bill of lading, although failure to issue will not prevent the relationship of shipper and carrier from arising."

The United States Supreme Court has explicitly based the common law right of action against carriers upon the violation of duties imposed by law independent of contracts. In Hannibal & St. Joseph Ry. v. Swift (1871), 12 Wall. (79 US) 262 at p. 270, 20 L ed 423 at p. 428, the Supreme Court said of the common carrier's duties:

"Its obligations and liabilities in these respects were not dependent upon the contract of the

parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract." (Emphasis supplied)

E. A breach of the basic obligation of a common carrier constitutes a tort, and makes the carrier liable in damages to the shipper.

This principle is a necessary corollary of the one just set forth. The right of the shipper or consignee to sue the carrier in tort for failure to perform his public obligation, rather than in contract on the contract of carriage, is declared in the Restatement of Torts, Sec. 866, as follows:

"Aside from statute, a person who is under a non-contractual duty to furnish facilities to the public without discrimination is liable in an action of tort for violation of such duty to a person entitled to such facilities."

Even when a contract of carriage has been entered into, the contract may be disregarded:

"That they (the shippers) may waive their right to sue upon the contract and bring an action in tort for damages, if any they have sustained, is a rule of law well established by an almost unbroken line of authorities." Owen Bros. v. C.R.I. & P. Ry. Co., (1908), 139 Iowa 538, 117 NW 762 at p. 764.

III. The carrier's common law duties have not been abridged or supplanted by the Interstate Commerce Act or by Idaho statutes.

While both the United States and the State of Idaho have adopted legislation regulating certain aspects of transportation and the obligations of common carriers, such enactments reinforce and strengthen, rather than abridge or supplant the common law obligations of a common carrier.

A. Part One of the Interstate Commerce Act preserves all common law rights and duties of carriers which are not absolutely inconsistent with specific provisions of the act.

Section 22 reads:

"* * * Nothing in this chapter [act] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 USCA, §22.

Speaking of this section, the Supreme Court said in Penn. R. R. Co. v. Puritan Coal Co. (1915) 237 US 131 at p. 129, 35 S Ct 484 at p. 487:

"That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." (Emphasis supplied)

This holding was reiterated in identical language in Penn. R. R. Co. v. Sonman Shaft Coal Co. (1916) 242 US 120, at p. 124, 37 S Ct 46 at p. 47.

B. The common law duties of carriers have not been limited or supplanted by Idaho law.

Idaho Code, §62-402 provides, in pertinent part, as follows:

"Every such [railroad] corporation must. . .furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or is offered for transportation at the place of starting, at the junction of other railroads and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport and discharge such passengers and property at, from and to such places, on the due payment of toll, freight or fare therefor."

Idaho Code Sec. 62-403 provides:

"In case of refusal by such corporation or its agents so to take and transport any passengers or property, or to deliver the same at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit." (Emphasis supplied)

It will be observed that these statutes in no way abrogate the common law obligations of the carrier, discussed

earlier herein, to accept, carry and deliver all property offered for transportation in accordance with the carrier's holding out. On the contrary, they merely restate and codify the carrier's obligations and its liability for failure to perform them.

IV. Defendant established no legally sufficient excuse for its failure to provide service.

The fact of defendant's failure to provide transportation service to plaintiff, pursuant to its published tariffs, from May 12, to October 17, 1966 was not disputed. Moreover, the trial court appeared to recognize, in some degree, the defendant's burden to justify its failure to do so. (Tran. p. 182, l. 7 - 9)

We submit, however, that defendant failed completely to prove any legally sufficient excuse for its non-performance. In Swayne & Hoyt v. Everett (1919, CCA 9th) 255 Fed 71, in awarding damages to a plaintiff whose goods were refused shipment, this court said:

"It does not admit of doubt that a common carrier, with certain well-established exceptions, is under legal obligation to carry the goods of any member of the public who may tender them for carriage. That such a carrier, subject to such legal obligation, may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control, is readily conceded, but in all such cases the defense

is an affirmative one, and the burden is upon the carrier to both plead and prove it." 225 Fed at p. 74

(Emphasis supplied.)

Defendant alleged an act of God as an affirmative defense (Rec. p. 28)

A. Defendant must prove objective impossibility which it could not have avoided and the exercise of the high diligence required by its public trust.

As the Swayne & Hoyt case, supra, indicates, certain limited and well defined exceptions to the common carrier's absolute liability have long been recognized. Generally, the only acceptable excuses were that the carrier was prevented from performance by an act of God or the public enemy. New Jersey Steam Nav. Co. v. Merchants' Bank (1848) 6 How (47 US) 344 at p. 381, 12 L ed 465 at p. 82. Coggs v. Bernard (1703) 2 Ld. Raymond 909, 92 Eng. Rep. 107 at p. 112.

Recent decisions have expanded these exceptions only slightly, holding that the carrier is liable unless it affirmatively shows that loss resulted from the shipper, acts of God, the public enemy, public authority, or the inherent vice or nature of the commodity. Secretary of Agriculture v. United States 350 US 162, 100 L ed 173, 76 S Ct 244; Missouri Pacific Railway Co. v. Elmore and Stahl, 377 US 134 12 L ed 2nd 194, 84 S Ct 1142.

1. The liability of the carrier is not based on negligence but exists without fault, subject to exceptions which the law has come to recognize.

From earliest times, the law has imposed liability upon the common carrier, not because of fault on his part, but from his failure to perform his public trust.

"The books abound with strong cases of recovery against common carriers, without any fault on their part; and we cannot but admire the steady and firm support with which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject without bending to popular sympathies, or yielding to the hardships of a particular case." Kent "Commentaries" (14th ed.) Vol. II, p. 602

And the Supreme Court has said:

"The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants." Adams Exp. Co. v. Croninger (1913) 226 US 491 at p. 509, 33 S Ct 148, at p. 153

and more recently:

"The common law, in imposing liability, dispensed with proof by a shipper of a carrier's negligence in causing the damage. . . ." Secretary of Agriculture v. U. S. (I.C.C.), 350 US 162, 100 L ed 173, 76 S Ct. 244. (Justice Frankfurter, concurring)

Accordingly, it appears that the trial judge misconstrued the issues in the instant case when, in analyzing the issues, he stated:

"First, is the matter of negligence on the part of the plaintiff in the maintenance of the Neva Tunnel

and whether or not the necessity for the closing of the tunnel was proximately caused by any such negligence." (Tr. p. 182, l. 10 - 15)

2. The exceptions to common carrier liability are limited to cases where performance is prevented by circumstances over which the carrier had, and could have had, no control.

The essence of the long recognized exceptions to common carrier liability is the complete inability of the carrier to prevent the occurrence of the event causing his default.

"The general liability of the carrier, independent of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident -- in other words, the act of God or the public enemy." New Jersey Steam Nav. Co. vs. Merchants' Bank (1848) 6 How (47 US) 344 at p. 381, 12 L ed 265 at p. 82. (Emphasis supplied.)

Indeed, as pointed out in the exhaustive opinion of Chief Judge Fee of the U.S. District Court for the District of Oregon in the case of Montgomery Ward and Co. v. Northern Pacific Terminal Company (1953) 128 F Supp 475, 511:

"Even where prevented by the act of God or the public enemy, there must be an affirmative showing that

"it (the carrier) did everything in its power to carry out its absolute obligation." (Citing U.S. Express Co. v. Kountze Bros. 75 US (8 Wall) 342, 352, 19 L Ed 457; Penn R.R. Co. v. Olivite Bros. 243 US 574, 37 S Ct 468; and other cases)

This Court clearly stated the principle in Swayne & Hoyt v. Everett, supra, when it said that a carrier under a legal obligation to accept goods tendered to it

"may show that it was prevented from performing it by act of God or a public enemy, or by some other cause over which it had no control. . ." (Emphasis supplied) 255 Fed at p. 74.

3. The common carrier may not escape the consequences of a default if its negligence has contributed to the existence or continuance of the obstruction preventing service.

Since the common carrier's failure to serve is only excused when the carrier is prevented from giving service by cause over which it has no control, no excuse can be predicated upon a cause initially existing or continuing to exist because of the carrier's failure to exercise the diligence required of public servants.

a. The carrier is not excused if the interference could have been avoided by forethought. Applying this principle the Supreme Court imposed liability upon an express company for gold lost to a band of armed robbers, even though the company had inserted in its receipt for the gold

a clause exempting it from losses due to "mobs, riots, insurrections, or pirates." The court held that the company had a choice of two routes -- one safe and one running through dangerous and unsettled country. By failing to choose the safer route, the carrier subjected itself to liability. U. S. Express Co. v. Kountze Bros. (1869) 8 Wall (75 US) 342, 19 L ed 457.

Similarly, though a car shortage due to unusual and unforeseen demands is a lawful excuse for failure to furnish cars, the carrier is not excused if the shortage could have been anticipated and prepared for.

". . . It was defendant's duty to provide for such a situation. A common carrier cannot excuse its failure to meet natural and normal traffic conditions by saying that it failed to anticipate them or to provide against them. That would be merely offering its own nonfeasance as an excuse for the injurious consequences thereof."

Baker v. St. L. etc. R. Co. (1910) 145 Mo. A. 189, 197, 129 S W 436, 438.

In C. B. & Q. R. Co. v Manning (1888) 23 Neb. 352, 37 NW 462, at pp. 464-465, the court said:

"It is claimed that the high water, being an act of God, exonerates the plaintiff. There is no proof, however, that such floods were not to be anticipated, or that the railway had been so constructed as to withstand the same." /

Thus even an act of God, if its effects can be anticipated and avoided, is no legally sufficient excuse for the carrier's failure.

b. The carrier is not excused unless the unavoidable interference was the sole cause of the default, unmixed with negligence. A case which illustrates this principle, Bell Lumber Co. v. Bayfield Transfer Ry. Co., 172 NW 955 (Wis), is as closely parallel to the present one, factually, as any we have found. The plaintiff in that case had a substantial quantity of logs in the woods awaiting shipment, part of it adjacent to plaintiff's siding and part on the railroad's siding. Traffic on the only railroad line serving plaintiff was suspended from April 3 to May 12, 1914, while repairs were being made to the defendant's bridges. On May 18, part of the lumber had not yet been shipped, though demands for service had been made. This lumber, which was standing on plaintiff's private railroad spur, was destroyed in a forest fire for which defendant was in no way responsible. Prior to the fire, part of plaintiff's lumber had been shipped and had been sold on a market which was somewhat lower than it had been a month before, when plaintiff first demanded service. Plaintiff sought damages for delay in accepting its lumber, based on the decline in market value which occurred during this period. Plaintiff also sued for its loss due to destruction of the balance of the lumber in the fire. The Wisconsin Supreme Court upheld plaintiff's right to recover from the common carrier defendant on both counts. The defendant claimed impossibility, due to the condition of its bridges and due to delays encountered in arranging financing of the repairs, but the court rejected this, pointing out that the bridges could be and were repaired and the service reinstated -- but not soon enough.

The court observed:

"The defendant's superintendent knew in 1913 that the road was bad and the bridges were deteriorating and badly in need of repairs, that defendant lacked funds for making repairs, but that no effort was made prior to the first of April by defendant to raise money with which to make repairs."

As to the fire loss, defendant denied proximate cause, but the court rejected this also, holding that the fire -- though an act of God -- could have been anticipated by defendant, who knew the risk of forest fire in that area, which increased as a result of the delay.

To the same effect, in Lehigh Valley R. Co. v. Allied Machinery Co. of America (1921) 271 Fed. 900, cert. den. 256 US 704, 41 S Ct 625, the court said:

"The argument that this explosion was to be treated like an act of God, such as the Johnstown flood, the San Francisco earthquake, or the volcanic eruptions at Mt. Pelee and Mt. Etna, does not convince us; but even in such cases of vis major the defendant would be obliged to show in addition that the loss was inevitable -- that is, could not have been prevented by the exercise of due care on his part." 271 Fed. at 903.

c. The carrier is not excused unless he shows that the method of performance which is obstructed is the only possible method. It is not sufficient for the carrier merely to show that the usual route or method used by it for performing the service it holds itself out to perform is obstructed. The

common carrier must make diligent efforts to find another route or method to transport the goods. C.R.I. & P. Ry. Co. v. Dawson, (1923) 157 Ark. 484, 248 SW 558; C.B. & Q. Ry. Co. v. Manning, (1888) 23 Neb. 352, 37 NW 462)

And in B. & O. R. Co. v. O'Donnell, 49 Oh.St. 489, 32 NE 476, the only "blocked tunnel" case which we have found, the Supreme Court of Ohio found the carrier excused from rendering service only so long as performance remained impossible. The tunnel was made impassable by a fire on January 1. Within a few days, "arrangements were made by the defendant, by which the express matter carried either way on the road could be and was transferred around the tunnel, and the plaintiff's goods could have been so transferred and delivered...." Accordingly, the court upheld an instruction that:

"If the tunnel was rendered impassable for cars, the defendant was excused from making delivery until the obstruction ceased, or other means of effecting the delivery could reasonably be procured; and then further delay in making the delivery, on account of the tunnel, was not excused...." 32 NE at 480.

B. The diligence and care which the common carrier must exercise is the extreme diligence and care commensurate with its character and status as a public servant discharging a public trust.

When the courts speak of the exercise of care and diligence by a common carrier, they do not refer to the ordinary care or diligence required of a reasonable man.

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties -- an object essential to the welfare of every civilized community. Hence, the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the reason of raising the most stringent motive for the exercise of carefulness and fidelity in his trust." (Emphasis supplied) N.Y.C. RR. Co. v. Lockwood (1873) 17 Wall. (84 US) 357, at pp. 377-378, 21 L.ed. 627, 639.

And the law permits the carrier to assert only those excuses which are consistent with this principle, thus:

"It was just and reasonable that they should not be chargeable for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against." (Emphasis supplied) Ibid, 17 Wall. at 380, 21 L.ed. at 640.

This long recognized general principle has been consistently adhered to up to the present day. C. & E.I. R. Co. v. Collins Produce Co. (1919) 249 US 186, 193, 39 S Ct 189, 190; American Trucking Assn. v. Atchison, T. & S.F. Ry. Co. (1967) __ US __, 87 S Ct 1608; Minn. & St. L. Ry. Co. v. Pacific-Gamble Robinson Co. (CA, Minn.) 215 F.2d 126.

With a similar general import, it is said in Michigan Consolidated Gas Co. v. F.P.C. (CA, DC, 1960) 283 F.2d 204:

"The fact that abandonment of public service requires government approval symbolizes the special legal status

"and obligations of common carriers and public utilities.

This includes an obligation, deeply imbedded in the law, to continue service." 283 F.2d at 214. (Emphasis supplied)

V. There was evidence from which the jury could have found that defendant did not discharge its duty to provide transportation service to plaintiff as required by the common law, the Interstate Commerce Act and Idaho statutes.

We submit that the rules and principles set forth in, perhaps, unnecessary detail in the preceding portions of this brief, as applied to the circumstances of this case, compel the conclusion that the trial court erred in holding defendant only to a standard of ordinary negligence and, by such standard, finding defendant free from liability, as a matter of law.

While the trial judge mentioned his conviction that the defendant "had an obligation to accept and carry plaintiff's lumber," and that the defendant "has the burden of showing the propriety of its reasons for not doing so," it is apparent that he regarded defendant's burden to be fully discharged if two things were shown: (1) that the necessity for the closing of the tunnel was not proximately caused by defendant's negligence; and (2) that defendant acted reasonably in its choice of method and procedure for reinstating the service.

The trial court found the first to be proved by finding that the closing of the tunnel was "unquestionably shown to have been caused by an unusual, massive movement of

earth and not through negligent maintenance of the structure. As shown later herein, this determination was not supported by the required overwhelming weight of evidence, but, right or wrong, the court's determination ignores completely such relevant and material questions as:

- (a) Was the condition of the tunnel such as to render its use impossible?
- (b) Could the closing of the tunnel have been avoided by proper maintenance or by reconstruction of the tunnel at an earlier, more favorable time?
- (c) Could defendant have provided plaintiff with substitute service of any sort?
- (d) Did defendant have any obligation to help plaintiff to minimize his losses by at least giving him reliable information about the probable duration of the suspension of service?

The second determination by which the trial court completely absolved defendant of any liability whatever, as a matter of law, was based on the finding that the defendant made a reasonable choice -- as an ordinary business decision, apparently -- as to the procedure followed to restore the service. Again, this determination ignores several significant questions:

- (a) Did defendant, as a common carrier charged with a public trust, fail in its duty to plaintiff and the public by not reinstating service as promptly as possible?
- (b) Did defendant fail in such duty by failing to plan the "daylighting" job in advance, or by failing to carry out its negotiations with the State of Idaho before the closure

of the tunnel?

(c) Did defendant fail in such duty by delaying restoration of the service to any substantial extent, merely to assure participation of the State in the cost of the project, when it was aware that its gain was the shippers' loss?

The trial judge not only refused to permit the jury to consider any of these issues, it would seem that he declined to consider them himself. Yet the evidence, and reasonable inferences therefrom, were clearly sufficient to justify submitting these issues to the jury; or -- to put it more accurately, in view of defendant's burden of proof -- the evidence was clearly not sufficient to justify deciding them in defendant's favor as a matter of law.

A. Defendant did not prove objective impossibility of performance, and the evidence shows that no such impossibility existed.

As we have seen, in order to excuse its failure to discharge its common law and statutory duties, defendant was required to prove not merely that performance had become difficult or expensive, but rather that it had become impossible. Defendant's proof fell far short of this; in fact, the evidence conclusively establishes the contrary.

The closing of the tunnel was not "caused by an unusual massive movement of earth" in any physical sense, so as to make the passage of trains through the tunnel physically impossible. There had been a collapse or cave-in of the tunnel some three or four weeks earlier, but this obstruction had been cleared

away. (Tran. p. 56, l. 18 - 25; p. 58, l. 15 - 17) The closing on May 12 was actually caused by the order of Mr. Pajari, defendant's division engineer, which was in turn caused by his belief that the tunnel was unsafe, following his inspection of the same date. (Tran. p. 77, l. 16 - 26) This may well have been a correct determination, but it should be recognized that we are not here concerned with a blocked tunnel through which trains could not pass, such as occurred about April 15. We are considering a suspension of service ordered by one of defendant's employees, who thought it was unsafe. The reason he thought so was because the tunnel was showing signs of new and rapid deterioration, evidenced by many new cracks in the timbers, with some supports down completely. (Tran. p. 77, l. 2 - 15; p. 78, l. 1 - 12).

Thus, it is clear that the discontinuance of freight service in and out of Elk River through the tunnel was not due to impossibility in the objective sense. Whether the closing of the tunnel was justified is another question -- and one, we submit, which the jury should have been permitted to decide, except that it was not determinative of defendant's liability anyway. If the use of the tunnel involved any great risk, we would not deny, of course, that its closure was proper, but this was not the first time the tunnel had showed signs of imminent collapse. (Tran. p. 53, l. 23 - p. 54, l. 13; p. 51, l. 25 - p. 52, l. 8)

But if we were to concede, arguendo, that temporary closing of the Neva tunnel was justified, this is not to say that suspension of freight service in and out of Elk River for more

than five months was justified. Certainly, the continuance of such service was not impossible. Defendant proved this when it carried one carload of plaintiff's lumber after the tunnel was closed -- by truck to Bovill and by rail from there. (Tran. p. 152, l. 25 - p. 153, l. 11) As in the other blocked tunnel case, (B. & O. Railroad Co. v. O'Donnell, 49 Oh.St. 489, 32 NE 476, 480) "arrangements were made by the defendant, by which the [freight ...] could be and was transferred around the tunnel, and the plaintiff's goods could have been so transferred and delivered." But the defendant herein, having found the way and hauled one carload, failed and refused for five long months to transport any more of plaintiff's lumber this way.

The defendant's reason for trucking this one carload of lumber was that it felt itself legally obligated to do so, by reason of the fact that it had accepted a bill of lading covering this car, (Tran. p. 153, l. 19 - p. 154, l. 12) indicating that the defendant recognizes its obligation to transport freight tendered in accordance with its tariffs if -- but only if -- it has signed a bill of lading covering it. This restricted view of the carrier's obligation was shared by its district manager of sales and, perhaps, its counsel and the trial judge also. (Tran. p. 126, l. 10 - p. 127, l. 18) but, as shown earlier herein, supra, page 25, it is not the bill of lading which imposes the obligations upon a common carrier but, rather, the carrier's assumption of a public trust and the public nature of its business. Hannibal & St. Joseph Ry. v. Swift (1871) 12 Wall. (79 US) 262,270, 20 L ed 423,428.

Defendant's district manager of sales, Mr. Sullivan,

expressed the view that it would be an illegal act for the defendant to provide freight service by truck from Elk River to Bovill. (Tran. p. 123, l. 10 - 17) Thus, paradoxically, it was illegal for them to do, but they were legally obligated to do it, so they did -- but only once.*

To further evidence its inability to provide alternative service to plaintiff by truck, Mr. Sullivan testified that defendant was not in the trucking business in Idaho, (although it is elsewhere) and that it had no trucks nor trucking rights in Idaho. (Tran. p. 118, l. 13 - p. 119, l. 6)

We submit, however, that all of the evidence falls far short of establishing -- so conclusively that reasonable minds could not find otherwise -- that it would have been impossible for defendant to provide any service to plaintiff throughout the more than five months that defendant was refusing to accept shipments from Elk River, tendered by plaintiff in accordance with defendant's continually effective published tariffs.

Perhaps the tunnel was unsafe and had to be shut down; perhaps defendant was prohibited by law to provide any alternative service; but defendant certainly didn't prove either contention!

- - - - -

*Mr. Sullivan testified, often over objection, as to various aspects of the carrier's legal rights and duties. To him the matter was relatively simple -- if the tunnel was closed, they couldn't handle shipments; if they couldn't handle shipments, they didn't accept bills of lading; and if they didn't accept bills of lading, they had no obligation to the shipper. The reliability of his views on this subject is, perhaps, best illustrated by his testimony at page 132 of the transcript (l. 6 - 16) in which he expressed the opinion that the defendant's obligations would be the same if it had capriciously blown up the tunnel!

B. Defendant did not prove that its negligence was not a contributing factor to its failure to serve.

The major part of this brief has been devoted to an effort to establish that this case should not have been decided, either by judge or jury, on the simple issues of whether defendant's negligence was the proximate cause of the closing of the tunnel and whether defendant acted "reasonably" in reinstating the service. Nonetheless, if these restricted issues were determinative, the motion for involuntary dismissal should have been denied, for not all of the relevant evidence -- nor even a preponderance of it -- tended to exonerate defendant.

Assuming, for the sake of argument, that the tunnel failure actually made it impossible for defendant to discharge its duties as a common carrier, defendant would still not be free from negligence -- or from liability -- as a matter of law.

1. The tunnel failure could have been anticipated and avoided.

As we have seen, a common carrier is not excused even by an event which renders its performance impossible, if the event could have been anticipated and avoided. To fail to so avoid the consequences of the event amounts to a failure to satisfy the high degree of care required of common carriers and is, therefore, negligence.

There is ample evidence, none of it contradicted, that the defendant herein could have anticipated the tunnel failure and, in fact, did anticipate it. As early as 1956, one of defendant's employees, after an inspection, called attention to

the condition of the tunnel and the tunnel lining, the crushed and split condition of many of the supports, and concluded:

"These helper bents are strictly a stop-gap measure as the rotten original lining cannot form a solid backing for them. We are spending a lot of money and still losing ground." (P. Ex. 5, Tran. p. 52, l. 5 - 8)

And again in December, 1956, after noting that the negotiations with the State for a joint daylighting project seemed to have bogged down, this same employee stated:

"In view of the above, we should definitely plan on the concrete lining no later than 1958." (P. Ex. 18)

Mr. Pajari, defendant's division engineer, discounted these observations and recommendations with the comment that

"The fact remains the tunnel stood for ten years."
(Tran. p. 52, l. 19 - 20)

Thus he suggests that the defendant was wise to ignore the recommendations for daylighting or concrete lining back in the fifties, and was wise to do very little maintenance on the tunnel, since they got by without any serious difficulties until April, 1966.

In 1964, defendant's section foreman checked the tunnel and reported that:

" . . . in Neva tunnel one of top timbers and one on side have came [sic] out right at the joint where top decking comes together and it appears to [the section foreman] that other timbers are cracking. This is in west end and it is worse since he last talked to C.E.M." (P. Ex. 8, Tran. p. 53, l. 23 through 54, l. 1)

In July, 1964 Mr. Pajari and his superintendent inspected the tunnel, found it to be deteriorating, and reported:

"We have considerable work to be done on the Neva tunnel this year and the portion of the tunnel where the two pieces fell out is included in 64 work." (Tran. p. 55, 1. 13 - 16)

Despite the condition of the tunnel and the recommendations for considerable work on it, Mr. Pajari testified that no maintenance or repair work was done in 1964 or 1965. (Tran. p. 51, 1. 2 through 4) With reference to these years, Mr. Pajari stated that they "had some maintenance work planned according to the record but did not consider it necessary to carry it out." (Tran. p. 69, 1. 20 through p. 70, 1. 10)

Moreover, Mr. Pajari testified that even the alleged "massive movement of earth" was a common natural occurrence and one which could be anticipated, although the exact location of any such occurrence might not be predictable with accuracy. (Tran. p. 97, 1. 14 through p. 98, 1. 24)

We submit that the foregoing evidence would have justified, if not compelled, any reasonable juror to conclude that the railroad was negligent in its maintenance practices and in failing to anticipate and avoid the consequences thereof.

2. Defendant's negligence was a proximate cause of the closing of the tunnel.

The trial court's remarks upon taking the case from the jury indicate that he may have recognized the existence of

negligence on the part of the defendant, but that he felt such negligence, as a matter of law, did not contribute proximately to the "necessity for the closing of the tunnel". (Tran. p. 182, l. 11 - 15) In order to reach this conclusion, the trial judge must necessarily have given credence to that small portion of the evidence and inferences therefrom favorable to the defendant, while d while disregarding much other evidence. For certainly the evidence was not all one way.

In support of the trial court's determination that the closing of the tunnel was "unquestionably shown to have been caused by 'an unusual massive movement of earth" -- which, incidentally, defendant never alleged*

The relevant evidence was as follows:

Pajari testified that his inspection on May 12 disclosed that the tunnel was under extreme and severe stress, evidenced by cracks in the vertical plane, in the posts and arch members and also in the horizontal, showing that there "necessarily had to have been a displacement of the lining of the tunnel" toward Bovill, and the cracks were fresh. (Tran. p. 71, l. 5 - 16) Then followed what the trial court apparently regarded as the only truly significant testimony in the entire case, though we submit that it is by no means unequivocal. On redirect

* Defendant's answer referred only to a "tunnel cave-in", but at the trial defendant went to some length to try to show that it wasn't really a cave-in, but was some less familiar natural phenomenon, which caused the shutdown of the tunnel. (Rec. pp. 26 - 28; Tran. p. 78, l. 1 - 12; p. 63, l. 7 & 19; p. 62, l. 8 - 18)

examination by Mr. Nelson, defendant's division engineer, Mr. Pajari, testified as follows:

Q. Did the condition of the tunnel at the time of your inspection on May 12, 1966, differ from the inspections you have done over the last ten years?

A. What do you mean?

Q. Was it in a different condition than previously?

A. Yes, very definitely a different condition indicated there as in places it showed a massive movement of earth and rock above the tunnel.

Q. Had that ever happened prior to May 12, 1966?

A. Well, other than what had happened at Elk River On April 12?

Q. Did you ever have a movement of the type you described in the tunnel prior to May 12, 1966?

A. No.

Q. You mentioned horizontal cracks, and so forth, inside the tunnel. Can you tell us how this differed from say any trouble you had with the tunnel prior to that date?

A. Well, the normal failure of the timbers because of age, moisture, and so forth, but this was actually a separation of the fibers of the timbers.

Q. Had that condition been in existence prior to that?

A. I never observed it.

Q. In other words, this was actually a split in the timbers due to pressure of the rock above?

A. Earth and the rock. It would be horizontal as well as vertical in places and there had been displacement of the timbers of the tunnel to the Bovill end.

Q. What caused the earth movement and shifting of the rock on or about May 12, 1966, or prior thereto?

Mr. Park: I object to that. I don't think he is qualified to answer that.

The Court: I will let him testify to what happened, if he knows. I am sure if he doesn't know he will say so.

A. All structures of nature, all grades, disintegrate, leveling out. There is an action of the elements of water, and so forth, on portions of the Neva Tunnel and this was an accumulation of earth formation and stresses that caused the failure." (Tran. p. 71, l. 17 - p. 73, l. 8.)

There was other evidence on this subject -- most of it double edged. Mr. McGovern, one of defendant's foremen, was reported to have expressed the opinion that "there had been movement in the tunnel" (Tran. p. 73, l. 19 - 27) and the report of regional engineer Smith (P. Ex. 12) referred to new cracks or additional openings in the old cracks in 90% of the post or segment members and reporting that 20% of the defective supports showed cracks in the vertical plane "indicating longitudinal movement of the timber tunnel lining. The remainder of the cracks were in the horizontal plane of the members "indicating vertical load undoubtedly unevenly distributed causing the failure."

Mr. Smith's report continued with an observation that there was considerable evidence of lateral movement in the

top of the tunnel showing up in the segments and lagging, most of it within the recent past -- perhaps a month -- "with most of the movement showing up in the past week." Foreman McGovern had noted a change within the past few days, and there were three segments in the east end which were displaced to the extent that two of them would undoubtedly fall out at the next slightest movement. Mr. Pajari, with some help from defendant's counsel, testified that the movement was very recent and that a "shifting of the earth and rock and of the tunnel itself" would be the only force sufficient to produce the phenomenon they had. (Tran. p. 77, l. 6 - 15)

The foregoing is virtually all of the evidence from which the jury might have inferred that any dangerous condition existing in the tunnel was due to "an unusual massive movement of earth." Even standing alone, it would seem to be somewhat less than conclusive. Considered together with other evidence in the record, certainly an open question of fact was clearly presented.

Consideration of the reports of defendant's employees would seem to indicate that, in their opinion, if there was any principal cause of the tunnel problems, it was probably the fact that repairs had been improperly made for many years. This is referred to in plaintiff's Exhibit 17, a 1955 memorandum, in which it is said that:

"I cannot understand the wisdom of using creosoted material as even if the tunnel was never daylighted, these helper bents are only temporary as they will be

placed on a backing of old, rotten timber, which formed the original lining of the tunnel." (Tran. p. 140, l. 17 - p. 41, l. 2)

And in plaintiff's Exhibit 5, it is said:

"These helper bents are strictly a stop-gap measure as the rotten original lining cannot form a solid backing for them." (Tran. p. 52, l. 6 - 8)

Also in plaintiff's Exhibit 10, it is said:

"As near as I can determine cause of this condition [separation and dropping out of crown timbers] due to old original lining being left in place and repair lining set inside. Present lining is now shoving back on the sides permitting crown timbers to loosen and drop out." (Tran. p. 26, l. 3 - 7)

Plaintiff's Exhibit 25, dated April 18, 1966, also makes note of this condition and advises:

"I find that most of the center portion of the tunnel was repaired in the manner previously mentioned. This being the case, tunnel will have to be checked periodically and any evidence of undue stress of roof segments will have to be given immediate attention.

Consideration should be given to daylighting this tunnel in the near future."

Further doubt is cast upon the "massive movement of earth" theory by the numerous bits of evidence which indicate that the movement was not of the earth, but of the lining of the tunnel. For example, Mr. Smith, reporting on

the May 12, 1966 inspection referred to "longitudinal movement of the timber tunnel lining." (P. Ex. 12, Tran. p. 74, l. 6 - 8)

Even Mr. Pajari was somewhat less certain what actually occurred than was the trial court. His memorandum of April 25, 1966, (P. Ex. 11; Tran. p. 57, l. 24 - p. 58, l. 25) stated:

"Per phone conversation, herewith, 7 photographs showing the situation at the west portal of Neva Tunnel on the Elk River Line where a portion of lining caved in on April 12. Counting from west to east the collapse involved frames 5 to 10 inclusive. It is not quite certain whether the failure of the frames precipitated slide of material into the bore or whether the reverse was true. In any event, approximately 100 yards of material came down to the track through the opening. Photos 1 to 4 inclusive are general views, the remainder are pictures of the interior in the area of the collapse.

Please note particularly that past repairs have been made by inserting new frames inside the old untreated frames which account decay show distortion which in turn permits distortion of the newer frames.

Per telephone reports we were able to restore traffic for the night of April 15. Replacement of the missing frames and of the remainder to the west is proceeding.

As your file will probably show we have a further inquiry from the Washington State Department of Highways [sic] concerning the joint project that has been under rather desultory consideration for a number of years."

At the trial, testifying as to the reason for taking the tunnel out of service, he stated:

"Actually it was movement of the frames supporting the rock and earth above the tunnel." (Tran, p. 78, l. 8-9)

This then was the evidence, in essence, directly relating to the true condition of the tunnel in April and May, 1966, which persuaded Mr. Pajari that it had become dangerous and that it should be closed. At best, this evidence is far from conclusive. It may have been a massive movement of earth, an act of God, perhaps, but a reasonable jury might very well have found otherwise.

Perhaps this "massive movement of earth" was akin to an act of God -- unprecedented, not to be foreseen, and unavoidable. Perhaps the tunnel would have been faced with imminent collapse requiring closure, even if the railroad had exercised the utmost diligence and if the tunnel had been beautifully maintained, regularly inspected and diligently repaired. And it is possible, we suppose, that defendant's "stop-gap" maintenance of the past many years, its failure to follow the suggestions or comments of its engineers, its failure to carry out recommended maintenance work -- or any maintenance work at all -- in either 1964 or in 1965, had nothing whatever to do with the deterioration of the tunnel to the point where it became unsafe. But, viewing the evidence and inferences therefrom most favorably to plaintiff's case, can it positively be said that reasonable men could not find otherwise?

3. Defendant failed to provide alternative or substitute service during the emergency.

The evidence showed that plaintiff made numerous requests for assistance with his shipping problem from defendant, in the form of truck service to Bovill, provision of a lift truck there, or merely a loading platform. Although these requests met with no clear refusal, defendant furnished him with no assistance whatever -- except for trucking the one carload from Elk River to Bovill. (Tran. p. 14, l. 14 - p. 15, l. 3; p. 142, l. 9 - 24; p. 144, l. 10 - 24; p. 168, l. 4 - 18.)

Defendant advised another Elk River shipper that no substitute service could be given because of I.C.C. regulations (P. Ex. 3, Tran. p. 17, l. 2 - 12); and defendant's district manager of sales so testified -- at least as to provision of a fork lift. (Tran. p. 124, l. 19 - p. 125, l. 1) His position with respect to loading facilities is less clear. (Tran. p. 123, l. 18 - p. 124, l. 18) But whatever Mr. Sullivan's opinion, these self-serving declarations cannot be regarded as conclusive proof that defendant could not legally provide any substitute service.*

*That there is such a thing as substitute service is evident from Plaintiff's Exhibit 21. This is a letter from the assistant general manager for the Western Region to the general manager of the railroad, in which the writer, discussing plaintiff's situation, found it necessary to advise:

"I find that the V. L. Johnson Lumber Co. have trucked 4 carloads of lumber to Bovill for loading on rail cars. No substitute service has been provided by the railroad."

One wonders if this advice would have been required if substitute service were absolutely prohibited.

Section 1 (15) of the Interstate Commerce Act (49 USCA § 1(15)), if its language is to be given its ordinary meaning, would seem to provide otherwise:

"§ 1, par. (15). Powers of the Commission in case of emergency. Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, ... (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such period as it may determine, and to modify, change, suspend, or annul them...."

While this section seems usually to have been applied to car shortages and similar emergencies, it certainly is not expressly limited to such situations, and we find nothing in the Act prohibiting establishment of emergency service arrangements.

The carrier may not discriminate, of course. Services furnished to plaintiff during the tunnel shut-down would have had to be furnished to other carload shippers of lumber from Elk River -- perhaps to all carload shippers from that point. But there were only three or four of them. (Tran. p.21, l. 1-13)

C. Defendant did not prove that it exercised the extreme diligence and care with which it was charged.

As shown earlier herein, (pages 37 - 39) a common carrier is held to a standard of diligence and care commensurate

with its status as a public servant discharging a public trust. Accordingly, defendant owed certain obligations to its customers, the shippers, which the ordinary person or business corporation would not owe. Its freedom of choice was somewhat restricted, and it could not decline to take actions necessary to the interests of the shippers merely because such actions were inconvenient or unprofitable for the carrier.

"A carrier has a duty to provide service to all the public, and such duty requires it to be furnished where it is unprofitable as well as where it is profitable."

Application of Omaha Transit Co. (Neb.) 94 N. W. 2d 461

By these standards, the evidence established that defendant herein did not measure up.

1. Defendant failed to take necessary corrective measures at a time when disruption of service could have been avoided.

The necessity for permanent repairs to the Neva tunnel -- either by daylighting or cement lining -- was known to defendant as early as the fall of 1954. (Tran. p. 137, l. 1 - 23) The daylighting project, as a joint venture with the State of Idaho, was proposed at that time (Tran. p. 137, l. 23 - p. 138, l. 15), and it was pointed out that from December to June "the problem of maintaining traffic during the work would not be encountered." (Tran. p. 138, l 16 - 23)

In late 1955, the urgency of the project was stressed by one of defendant's engineers in a report in which he said:

"After Webber came back from the meeting in Chicago, going over the 1956 work sheet, he advised that Crew C was to go to Neva tunnel in January to install several helper bents to make the tunnel safe for another year or two until we could consummate a deal with the State for daylighting the tunnel. Webber advises he was told to use creosoted material.

"I cannot understand the wisdom of using creosoted material as even if the tunnel was never daylighted, these helper bents are only temporary as they will be placed on a backing of old, rotten timber which formed the original lining of the tunnel.

"Will you please advise."

Despite the fact that several of defendants employees were aware of the grave necessity for permanent repairs, and that the daylighting project could have been accomplished during the fifties without seriously disrupting traffic, the project dragged along "under rather desultory consideration for a number of years" -- until June, 1967, after the condition of the tunnel became truly desperate and it had been closed, (Tran. 58, 1. 24 - 25; p. 81, 1. 7 - 13)

2. Defendant did not prepare in advance for the anticipated collapse of the tunnel so as to reduce the duration of the suspension of service.

As pointed out in the preceding section, defendant had known for years that a major rebuilding of the tunnel was inevitable. Yet defendant not only failed to undertake the

project until after it was necessary (or thought to be necessary) to close the tunnel and cut off freight service to Elk River, it even failed to plan in advance for the tunnel project -- by completing the required surveys, engineering, purchasing of rights of way, financing, and negotiating with the State. All of these things, as well as bid solicitation, selecting of contractor, execution of contracts and related matters, had to be done -- according to Mr. Pajari -- between May 12 and August 17, 1966, when the contract for the project was let. (Tran p. 82, l. 11 - p. 84, l. 19; p. 93, l. 10 - 22)

Thereafter, on August 23, the contractor moved onto the job, and 52 days later it was completed. On October 17 the rail service in and out of Elk River was finally reinstated. The service had been suspended, after the initial four-day period in April, a total of 158 days -- the best part of the year in Elk River and almost the entire operating season for plaintiff's sawmill -- during which time the lumber market declined steadily from record highs to extreme lows, and plaintiff lost about \$30,000. Yet the actual construction -- working two shifts just 'part of the time' -- required less than one-third of this period. (Tran. p. 93, l. 21 - p. 95, l. 18; P. Ex. 19, 20)

3. Defendant did not reinstate the service as promptly as possible.

Defendant does not force us to speculate as to the reasons for the long delay in restoring service. Defendant had what it seems to believe was the best reason in the world -- to save money. And save money it did! (Tran. p. 94, l. 11-20)

This was a laudable motive, of course. If defendant were an ordinary business corporation, it would probably be an unassailable one. But it wasn't; it was a common carrier, holding itself out by its published tariffs to accept, carry and deliver freight by rail from Elk River, for more than five months but refusing to do so. In these circumstances, defendant was not free to subject plaintiff to loss by refusing to perform its duty, merely to save money.

a. Defendant elected to defer repairs pending agreement with the State of Idaho. It is readily apparent from Mr. Pajari's testimony that defendant did, in fact, delay the daylighting project to assure the State's participation in the cost. (Tran p. 81, l. 7 - p. 82, l. 18) Part of his testimony was as follows:

Q (Mr. Park) You testified to problems arising in connection with acquisition of additional right-of-ways and surveys and that sort of thing. In fact, the major part of the delay in starting this project resulted, did it not, from the negotiations with the State?

A Preparation of plans and negotiations with the State, yes, sir.

* * *

Q Would you agree, Mr. Pajari, that the action of the Railroad with respect to reinstatement of the service through the Neva tunnel and its course of action was dictated primarily by the economic situation? /

* * *

A I am not personally aware of all the intricacies of management causes but certainly in determining what plan was to be followed the economics of money and time would be very influential.

* * *

Q . . . By making more or less temporary repairs on occasion rather than permanent repair of the Neva Tunnel until 1966 and by delaying the actual work on the job in 1966 until after an agreement had been negotiated under the State's share of the cost Milwaukee Road realized a substantial saving, did it not?

A Yes, that's right.

(Tran. p. 101, l. 5 - 10, l. 25 - p. 102, l. 11; p. 104, l. 19 - p. 105, l. 1)

b. By deferring repairs until agreement was reached with the State, defendant realized a substantial saving to plaintiff's great loss.

The daylighting project cost about \$180,000. Of this amount, the State of Idaho paid almost 69,000. By refusing to accept any shipments for the five months period, defendant may have deprived itself of \$36,600 in revenue -- \$31,500 from plaintiff, \$5,100 from the other Elk River Shipper, based on 1965 shipments. (Tran. p. 112, l. 3 - 14) Thus, even assuming that the \$36,600 in revenue would have been net income, defendant saved about \$32,400 by delaying the project to get the State's contribution. This is just a bit more than defendant lost from the suspension of service.



As a common carrier, obligated under the law to use the utmost care and diligence in the performance of its public trust, defendant should not be allowed -- as a matter of law -- to benefit from its own default, to the plaintiff's disastrous loss.

4. Defendant failed even to give plaintiff reliable information regarding the probable duration of the suspension of service.

It is apparent from the evidence that a subject of very great concern to plaintiff was the probable duration of the suspension of service. He called Mr. Sullivan about it on at least one occasion (Tran. p. 111, l. 8 - 18) and he frequently asked the station agent in Bovill, Mr. Holland, about it. (Tran. p. 143, l. 2 - 4) These gentlemen made some effort to find out, apparently, but no one was ever able to tell them.

In response to a written request from another Elk River shipper, defendant's superintendent advised that the line would be out of service until at least July 15. (P. Ex. 3, Tran. p. 17, l. 13 - 17) Either from seeing this letter or by inquiry to Mr. Sullivan, plaintiff was advised that the railroad would open on or about July 15, 1966.

Relying on this initial advice, plaintiff elected not to substantially alter his method of operation, believing that he could get by if the service were restored by July 15. (Tran. p. 164, l. 25 - p. 165, l. 21)

On August 9, 1966, plaintiff had his attorneys write

to defendant (P. Ex. 1). No response to this letter was received until about September 1, when defendant's western counsel advised that the service was expected to be restored by the middle of October. (P. Ex. 2) By the time this first reasonably accurate information was received by plaintiff, both the operating season in Elk River and the lumber market were waning rapidly.

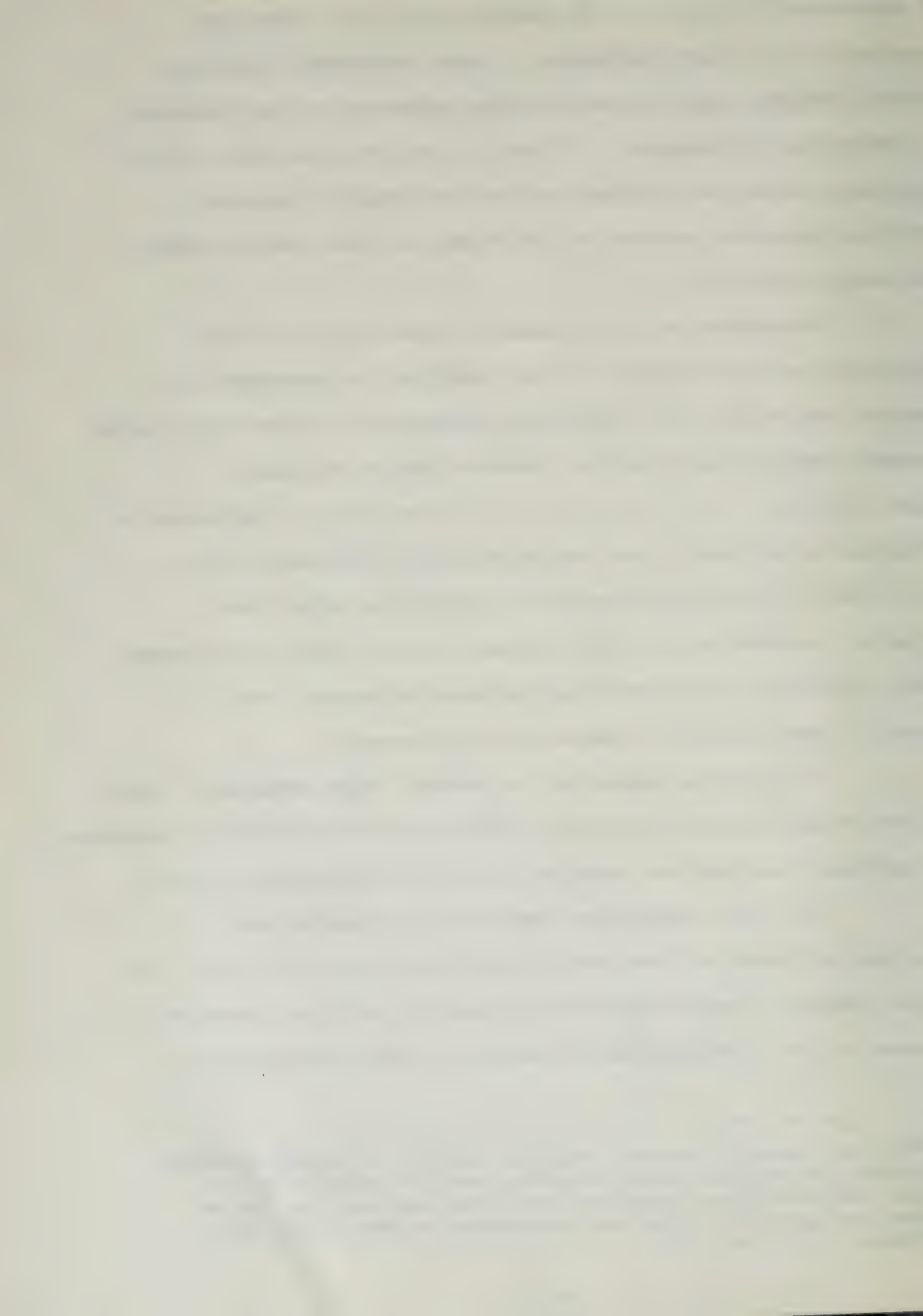
Defendant was well aware of the effect of the suspension and the effect of the inability to determine its probable duration. Mr. Sullivan, apparently without being told, assumed that it could put Mr. Johnson out of business. (Tran. p. 116, l. 23 - p. 117, l. 19) Yet none of defendant's employees or officers took the defendant's obligations as a public utility seriously enough to bother to obtain any reliable information for its shippers, until about three weeks after plaintiff's attorneys had advised defendant that plaintiff would hold it liable for his damages.

It is quite possible, of course, that defendant itself did not know in May or June how long the service would be suspended -or perhaps, whether the service would be reinstated at all.*

The chief carpenter apparently estimated the duration at three to four months from about May 13 (P. Ex. 12) but of course it was impossible to predict with any accuracy, because of the uncertainties inherent in the negotiations

- - - - -

*The defendant's general manager wrote its superintendent on May 26 requesting information on Elk River traffic for the past five years and anticipated traffic "so we can properly evaluate the economics of restoring Neva Tunnel." (P. Ex. 24)



with the State of Idaho. Mr. Pajari testified that the project, which took just over five months, "went very well considering the nature of the work and the parties involved." (Tran. p. 96, l. 15 & 16)

At any rate, Pajari, at least, was certain at the outset that the tunnel would be out of service for at least three to four months and would certainly not be back in by July 15. (Tran. p. 61, l. 8 - 13)

But unfortunately nobody ever bothered to tell this to the plaintiff, Mr. Johnson, -- the one person most vitally concerned.

D. Defendant's abandonment of service for an extended period without I.C.C. authority subjects it to liability.

Under common law, the Interstate Commerce Act (49 USC § 1(18) or Idaho statute (I. C. §61-307) defendant, as a common carrier, could not abandon or discontinue a portion of its established line or services without subjecting itself to liability to persons damaged thereby, except upon authorization of the appropriate regulatory agency.

As stated in Michigan Consolidated Gas Co. v. F.P.C., (CA-DC, 1960) 283 F 2d 204:

"The fact that abandonment of public service requires government approval symbolizes the special legal status and obligations of common carriers and public utilities. This includes an obligation, deeply embedded in the law, to continue service." (283 F 2d at 214; See also, Application of Union P. R. Co., 64 Idaho 597, 134 P 2d 1073.)

As we have seen earlier herein, the carrier may suspend service when it is impossible for him to perform it, and in certain circumstances this suspension on an emergency basis would absolve him from his obligation to accept, carry, and deliver proffered shipments. But this was not such a situation, and our research has disclosed no case in which a common carrier was held justified in refusing service for a period of anything like five months, while its tariff covering such service remained in effect.

As defendant's employees seem to recognize, it was an unusual situation! (Tran. p. 158, l. 1 - 14; p. 124, l. 25 - p. 125, l. 13)

On May 26, 1966 defendant's superintendent wrote to the general manager, L. V. Anderson, as follows:

"Until repairs completed on Neva Tunnel suggest embargo be placed on all inbound and outbound traffic stations traveling to Elk River immediately." (Tran. p. 106, l. 18 - 24)

In response to this suggestion, however:

"L.V.A. called and said no embargo" (Tran. p. 106, l. 25 - p. 107, l. 3)

The reason for this action on the part of defendant does not appear. We submit that it may have been -- and the jury would have been justified in inferring -- that no embargo was placed because the imposition of an embargo would have required defendant to obtain an ordinance from the Interstate Commerce Commission under Section 1(15) of the Act, or an order authorizing partial abandonment under Section 1(18). In connection

with the issuance of either order, the Commission could have imposed terms or conditions upon defendant for the protection of affected shippers.

At the very least, the seemingly strange behavior of defendant in this situation, with reference to its failure to seek any order whatever from the Interstate Commerce Commission or the Idaho Public Utilities Commission, is further evidence of defendant's callous disregard for the rights and interests of the plaintiff and the public, and for defendant's common law obligations to them.

Proposition Two -- THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFF HAD FAILED TO PROVE ANY DAMAGES WITH SUFFICIENT CERTAINTY.

After ruling against plaintiff on each of the two issues which the trial judge saw in this case -- negligence of the defendant as the proximate cause of the tunnel closure and the reasonableness of defendant's procedure to reinstate the service -- the court stated:

"Assuming arguendo that I may be in error in either of the first two determinations, there is still the question of damages. Damages must be proved by the plaintiff with sufficient certainty that a jury can set the damages by some reasonable measure and not have to resort to speculation or conjecture." (Tran. p. 183, 1. 15 - 25)

After mentioning some of the evidence of damages and certain items which he believed were essential and had not been

shown, the judge continued:

"In order to arrive at a judgment in this matter the jury would, in my opinion, have to speculate to bring in a damage verdict. The evidence is not sufficient and the plaintiff has failed in his burden of proving damages with sufficient certainty." (Tran. p. 184, l. 16 - 21)

It is respectfully submitted that, once again, the trial court erred in its determination.

I. If an injury resulting in damages is shown, the amount of damages is a jury question and need not be shown with exact precision.

Under Idaho law, the jury must estimate the proper amount of damages to be awarded as best they can by reasonable probabilities based upon their sound judgment as to what would be just and proper under all the circumstances. Shrum v. Waki-moto, 70 Idaho 252,256, 215 P.2d 991.

"Where a regular and established business is injured, interrupted or destroyed by the wrongful acts of another, the measure of damages, when and if recoverable, is the net loss and not diminution in gross income. Hence in the case before us, if the loss of business was occasioned by the acts of defendant, the measure of damages would be the loss of profits, if any, resulting from such wrongful act."

(Williams v. Bone, 74 Idaho 185,188, 259 P.2d 810)

And the Idaho Supreme Court has held that damages for injury to an established business need only be established with reasonable certainty. Boise Street Car Co. v. Van Avery, 61 Idaho 502, 103 P.2d 1107.

A. Proof of the extent of damages need not be made with the certainty required in proving liability for damages.

A firmly established rule of damages is that the extent or amount of damages suffered need not be proved with the certainty required to prove the fact that some damage to plaintiff resulted from defendant's wrongful conduct. As the Supreme Court has said in Story Parchment Co. v. Paterson Parchment Paper Co. (1931) 282 US 555, 51 S Ct 248:

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount."

282 US at 562, 51 S Ct at 250.

This rule is particularly applicable where the defendant's wrongful conduct contributes to plaintiff's inability to show his damages with certainty. Bigelow v. R.K.O. Radio Pictues, (1946) 327 US 251, 66 S Ct 574. In the Bigelow case, the court said:

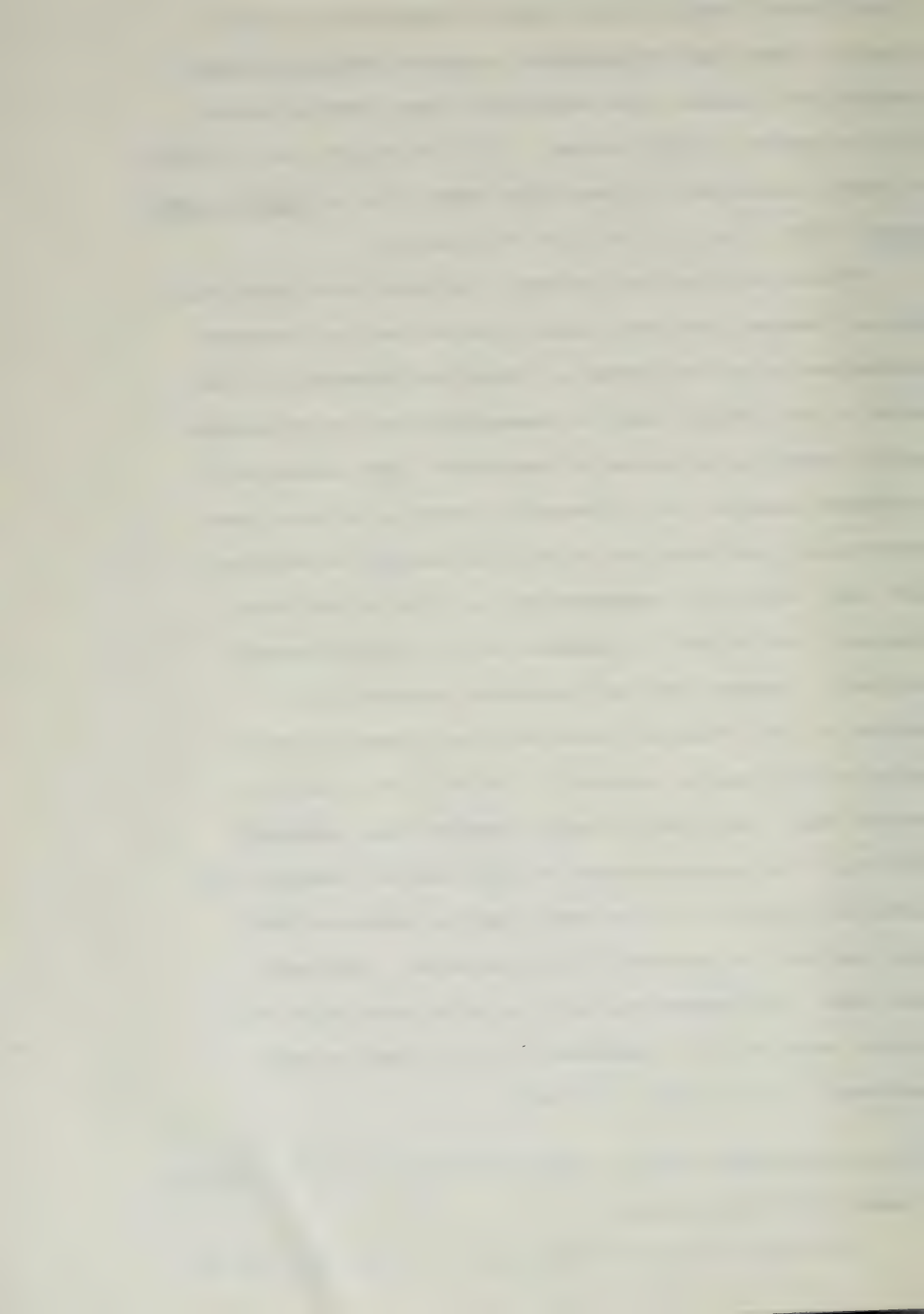
"The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded

a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage." 327 US at 266, 66 S Ct 580 This Court stated and followed the same rule in Brink's Inc. v. Hoyt (1950, C.A. 9) 179 F.2d 355, saying:

"There was abundant evidence to show that there was actual damage, and that being true we can not concern ourselves as to the amount. While the damages recoverable in any action must be susceptible of ascertainment with a reasonable degree of certainty, yet where unliquidated damages are recoverable there is always some uncertainty and they can rarely be exactly determined but they are to be compensatory for the injury done. However, the relief in damages is only approximately perfect. Damages are not rendered uncertain as a matter of law, however, because they cannot be calculated with absolute accuracy. It is also to be observed that one whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by plaintiff is not entitled to complain that they can not be measured with exactness. The mere fact that the damages may not be calculated with absolute certainty or exactness is not a bar to their recovery." 179 F.2d at 360-361.

I. The rules applicable to proof of damages in the present case are liberal ones.

Because of the circumstances of this case and the



questions before the Court on this appeal, the applicable rules, in addition to the one discussed in the foregoing paragraph, are liberal ones.

A. To avoid involuntary dismissal, plaintiff need show only that he has been subjected to some damage as a result of defendant's conduct.

Since the trial court was considering the evidence of plaintiff's damages upon defendant's motion for involuntary dismissal,* plaintiff's evidence of damages must be regarded as true, it need only be determined that there is some credible evidence that plaintiff has suffered some damage as a result of defendant's wrong; the amount of such damage is a proper subject for the jury, upon proper instructions, to determine.

"If nominal damages or damages in any amount are shown, the granting of a nonsuit or a peremptory instruction for defendant is improper...." 25 A, CJS, Damages, §176(2), p. 168.

B. The rule of damages to establish lost profits is a liberal one.

Consistent with the principles set forth in the foregoing sections, it is said that:

*Inasmuch as defendant did not assert the insufficiency of the evidence of damages as a ground for the motion for involuntary dismissal and the order of dismissal does not mention it, we doubt that this issue should have been considered by the trial court, for this Court has held that a motion for directed verdict is the proper motion in a jury case (Kingston v. McGrath, 232 F.2d 495) and that motion, under Rule 50 (a) requires specific statement of the grounds therefore.

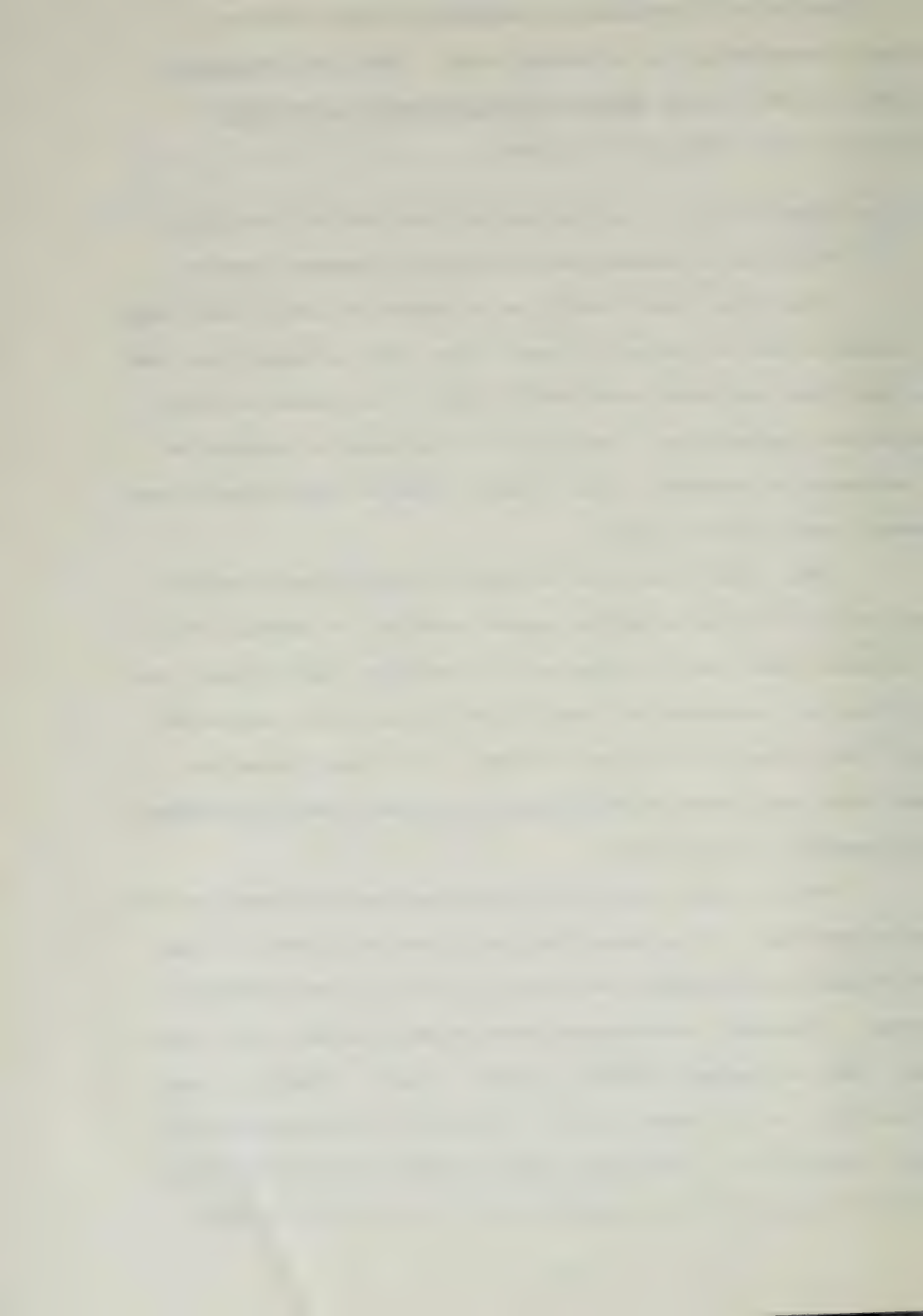
"The rule of evidence to establish lost profits, when recoverable, is a liberal one." 25A CJS, Damages, §155, p. 48, citing Western Feed Company v. Heidloff, 230 Ore. 324, 370 P.2d 612, 619.

III. No speculation or conjecture on the part of the jury is required to determine plaintiff's damages herein.

The trial court held, as a matter of law, that there was insufficient evidence to permit the jury to award any damages and that any such award would have to be based on speculation and conjecture. Analysis of the judge's remarks on the evidence of damages shows clearly that he overlooked some relevant parts of the proof.

The judge found the evidence insufficient because there was no showing of prior years' profits -- except 1965 -- and because there was no showing of inventory carryovers. He also found no breakdown of profits by carloads nor any showing of the number of cars not shipped. The court also observed that the lumber market was good in May, bad in October, with a constant falling off.

For the most part, the evidence does not bear out the court's remarks. It is true that only one prior year's operating results and income tax return -- 1965 -- was offered in evidence. However, inventories were clearly shown, from December, 1964 to January, 1967. (P. Ex. 19,20) Profit by carload in 1965 -- if significant -- could be determined by a simple computation, since the record showed that 44 cars were shipped by plaintiff that year (P.Ex. 22), and, of course,



there was no profit per car in 1966 and loss per car would be a meaningless and misleading figure. Similarly, number of cars not shipped would be a matter of pure speculation -- unless based on the 1965 figure.

Moreover, the trial court's remarks concerning the market in 1966 seem to indicate that he overlooked the most significant bit of the expert's testimony, which was to the effect that, over the year as a whole, prices for the species of lumber manufactured by plaintiff were higher in 1966 than in 1965. (Tran. p. 176, l. 21 - p. 177, l.2; p. 162, l.22-27)

Whether the testimony of plaintiff that he had reason to anticipate a better year in 1966 than in 1965, because of better equipment, larger inventory and better market, would support a jury award of lost profits in excess of the 1965 figure may be a close question. But surely, standing uncontradicted, this evidence, together with plaintiff's testimony that his losses in 1966 were due entirely to his inability to ship his lumber, would permit the jury to award him a similar profit. And plaintiff's net loss from operations in 1966 -- \$21,210.46 -- was proved in detail and is a proper item of allowable damage.

It may be, of course, that plaintiff's damages cannot be proved exactly. But the mere fact that it is difficult to arrive at the exact amount of damages where it is shown damages resulted, does not mean that none may be awarded, and it is for the jury to fix the amount. Conley v. Amalgamated Sugar Co. 74 Idaho 416, 423, 263 P.2d 705.

Given the weight and credence it demands on a motion to

dismiss, the evidence herein shows clearly that plaintiff was, in fact, damaged by the wrongful acts of defendant -- to the extent, at least, of his net loss in 1966. Defendant should not, therefore, be permitted to escape liability merely because the determination of the proper award of damages would require the exercise of some judgment on the part of the jury.

Proposition Three -- THE TRIAL COURT ERRED IN REFUSING TO PERMIT PLAINTIFF TO REOPEN HIS CASE TO SUBMIT FURTHER EVIDENCE THE COURT DEEMED ESSENTIAL TO RECOVERY.

Immediately after the trial court had granted defendant's motion for involuntary dismissal, plaintiff moved to reopen his case in order to submit more specific evidence on the issue of damages. The motion was promptly denied. (Tran. p.185, 1. 1 - 8). If the court believed further evidence on the damage issue was necessary, we submit that the motion should have been granted.

I. It is common practice to permit reopening and submission of additional evidence after motion for involuntary dismissal.

With the liberalization of trial practice which has come with the Rules of Civil Procedure, the courts have more and more consistently recognized that law suits should be determined on their merits, rather than upon the skill of counsel. Accordingly, it has become common practice to permit a party to reopen his case to submit additional evidence if he discovers, or the court indicates, that he has omitted some ele-

ment of his proof -- whether through oversight or misconception of the requirements of the law. This practice is especially common after a motion for non-suit, directed verdict, or involuntary dismissal. 53 Am.Jur., Trials, Sec. 123, p. 109. See: Spokane Merchants' Assn. v. Olmstead, 80 Idaho 166, 170, 327 P.2d 385.

II. The trial court should grant a motion to reopen to receive evidence necessary to the proper disposition of the case, especially where no delay or inconvenience will result.

In the exercise of its discretion, the trial court should permit reopening, after a motion for disposal of the case, to receive evidence inadvertently omitted, or evidence which is necessary for the proper disposition of the case or which might affect the court's ruling on the motion to dispose of the case. And this should be done, especially, where reopening will not result in any appreciable delay or inconvenience to the court or opposing counsel. 88 CJS, Trial, § 108, p. 225.

Here plaintiff's motion was made immediately after the court's ruling on the motion for involuntary dismissal -- which was the first opportunity plaintiff's counsel had, since defendant had not raised the issue of the evidence of damages in his motion or argument. No delay of the trial would have been involved; no inconvenience to the court, the jury, or to counsel would have resulted; and, certainly, defendant could not have claimed surprise or prejudice in any other respect.

It was recognized by plaintiff's counsel when the

motion was made, that it was not likely to receive favorable consideration, in view of the court's ruling on other issues which it believed were raised by the motion to dismiss. Accordingly, we respectfully submit that the trial court, in ruling upon the motion, probably dismissed it rather summarily and without serious consideration of its possible merit. If this Court should, therefore, incline to agree with the trial court's position regarding the proof of damages, we earnestly request that the motion to reopen be weighed in the light of the circumstances existing at the time it was made and ruled upon.

CONCLUSION

Plaintiff introduced ample evidence which would have justified a finding by the jury, acting reasonably, that defendant breached its common law and statutory obligations as a common carrier in at least one of a number of ways. The jury could have reasonably found, further, that such breach of duty resulted in defendant's suffering very substantial damages.

The jury should have been permitted to decide these issues.

Another jury, at a new trial, should yet be permitted to decide them.

Respectfully submitted this 14th day of October, 1967.

McFadden & Park

By 

Jerrold E. Park

Attorneys for Appellant
St. Maries, Idaho

APPENDIX TO APPELLANT'S BRIEF

Listing of Exhibits

<u>Number and Description</u>	<u>Page at which</u>		
	<u>Ident.</u>	<u>Offered</u>	<u>Admitted</u>
Plf. Ex. 1 - Letter dated Aug. 9, 1966	13	13	(Rej.) 15
Plf. Ex. 2 - Letter dated Aug. 30, 1966	(Stip) 12	12	12
Plf. Ex. 3 - Letter dated May 25, 1966	(Stip) 12	12	12
Plf. Ex. 4 - Shipment record	(Stip) 33	33	33
Plf. Ex. 5 - Letter dated May 7, 1956	(Stip) 51	51	51
Plf. Ex. 6 - Letter dated Feb. 9, 1955	(Stip) 51	51	51
Plf. Ex. 7 - Letter dated May 16, 1956	(Stip) 51	51	51
Plf. Ex. 8 - Wire dated June 30, 1964	(Stip) 51	51	51
Plf. Ex. 9 - Letter dated July 8, 1964	(Stip) 51	51	51
Plf. Ex.10 - Letter dated Apr. 1, 1966	(Stip) 51	51	51
Plf. Ex.11 - Letter dated Apr. 25, 1966	(Stip) 51	51	51
Plf. Ex.12 - Letter dated May 13, 1966	(Stip) 51	51	51
Plf. Ex.13 - Letter dated Aug. 17, 1966	(Stip) 51	51	51
Plf. Ex.14 - Letter dated Aug. 29, 1966	(Stip) 51	51	51
Plf. Ex.15 - Letter dated June 22, 1966	(Offered by dft.) 84-85	85	85
Plf. Ex.16 - Letter dated Feb. 3, 1955	(Stip) 136	136	136
Plf. Ex.17 - Letter dated Nov. 9, 1955	(Stip) 136	136	136
Plf. Ex.18 - Letter dated Dec. 6, 1945	(Stip) 136	136	136
Plf. Ex.19 - 1965 Federal Income Tax	159	159	159
Plf. Ex.20 - 1966 Federal Income Tax	159	159	159
Plf. Ex.21 - Letter dated Aug. 29, 1966	(Stip) 181	181	181

Proposed Pre-trial Order (Apparently Never Signed nor Filed)

McFADDEN & PARK
St. Maries, Idaho
245-2521

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO
NORTHERN DIVISION

V. L. JOHNSON, d/b/a V. L. JOHNSON)	
LUMBER COMPANY,)	
)	
Plaintiff,)	Case No. _____
)	
vs.)	PRE-TRIAL ORDER
)	
CHICAGO, MILWAUKEE, ST. PAUL and)	
PACIFIC RAILROAD COMPANY,)	
)	
Defendant.)	
)	
-----)	

There having been no opportunity for pre-trial conference with the Court in the above-entitled matter, and counsel for both parties having conferred pursuant to this Court's order of February 6, 1967, IT IS ORDERED:

I.

This is an action for damages sought by the plaintiff, V. L. Johnson from the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company on the basis of three alternative causes of action set forth in plaintiff's complaint.

Each cause of action alleges that plaintiff was the

owner and operator of a sawmill at Elk River, Idaho and has shipped substantial quantities of lumber over defendant's railroad line; that on or about May 13, 1966, without notice to plaintiff or lawful authority, defendant discontinued freight service between Elk River and Bovill, which service had not been restored on September 27, 1966; that plaintiff had made frequent demands for service which were ignored by defendant; that defendant's failure to provide service to plaintiff resulted in damages to plaintiff from loss of profits, deterioration of logs and timber owned by plaintiff and additional expenses incurred by plaintiff.

Plaintiff's first cause of action alleges liability of defendant for violation of duties imposed upon common carriers by the Idaho Constitution and by Idaho and federal statutes.

Plaintiff's second cause of action alleges liability of defendant for negligence in the maintenance of its railway line, resulting in a tunnel cave-in and the suspension of service, all to plaintiff's damage.

Plaintiff's third cause of action alleges that the freight service discontinued on May 13, 1966 could have been restored within thirty days thereafter, but that defendant negligently and in violation of its statutory duty failed to make reasonable efforts to repair the tunnel and restore service, as a result of which freight service had not yet been restored to the date of the complaint, September 27, 1966, all to plaintiff's damage.

Defendant's answer denies many of the allegations of plaintiff's complaint, as hereinafter set forth.

II.

Federal jurisdiction was invoked by defendant by petition for removal from state court upon the ground of diversity of citizenship, there being in excess of \$10,000 in controversy in this action, and plaintiff being a citizen of Idaho and defendant corporation being a citizen of Wisconsin by reason of incorporation in said state and by having its principle place of business therein.

III.

The following facts are admitted and require no proof:

(a) The jurisdictional facts set forth in paragraph II above;

(b) That plaintiff is an individual doing business under the firm name of V. L. Johnson Lumber Company at Elk River, Idaho;

(c) That defendant is a railroad corporation doing business in the State of Idaho as a common carrier of freight;

(d) That since the year 1963 plaintiff has operated a sawmill in Elk River, Idaho and has regularly shipped substantial quantities of lumber in carload lots over defendant's railroad line between Elk River, Idaho and its connection with defendant's main line at St. Maries, Idaho;

(e) That virtually all of plaintiff's shipments of lumber referred to above have been destined for points outside the State of Idaho and have hence constituted shipments in Interstate Commerce.

(f) That on or about April 12, 1966 a partial

cave-in of a tunnel on defendant's railroad line between Bovill and Elk River, Idaho resulted in a temporary suspension of rail service to and from Elk River, Idaho, which suspension continued until April 15, 1966.

(g) That on May 12, 1966, service over said line was again suspended, which suspension continued until October 15, 1966.

(h) That no orders were obtained by defendant from the Idaho Public Utilities Commission or the Interstate Commerce Commission prior to such suspension of service, or at any time.

(i) That maintenance and repair work in the tunnel in question, from May 13, 1961 through May 13, 1966 consisted of the following:

1962 - Renewal of frames and brace posts - intermittently

1963 - Renewal of frames and brace posts - intermittently

1964 - None

1965 - None

1966 - Renewal of frames and brace posts
April 18 to 20, May 7 to 13

(j) For several years prior to the suspension of service involved herein, the condition of the tunnel had been questionable because of shifting of earth in the hill and rotting and cracking of timber bracing due to age and earth shift, and defendant had been considering replacing the tunnel with a cut.

(k) Defendant entered into a contract with Morrison - Knudsen Company to replace the tunnel with a cut on August 17, 1966, and said company commenced such work on

August 24, completing it on October 12, 1966.

IV.

Neither party asserts any reservations with respect to the facts cited in paragraph III above.

V.

The following issues of fact, and no others known to plaintiff, remain to be litigated upon the trial:

(a) Whether the discontinuance of freight service between Elk River and Bovill, Idaho resulted from an Act of God.

(b) Whether defendant failed to maintain its facilities so as to promote the safety, health, comfort and convenience of its patrons, employees and the public, and so as to provide adequate, efficient, just and reasonable service, as required by Idaho Code, Sections 61-302, 62-402 and 62-403.

(c) Whether such discontinuance could have been avoided by defendant through the exercise of ordinary care in the maintenance of the tunnel.

(d) Whether plaintiff made demands upon defendant for service from Elk River, and if so, whether defendant failed to honor such demands.

(e) Whether defendant advised plaintiff during May or June of 1966 that service on defendant's line would be restored on or before July 15th, or some other date prior to October 15, 1966.

(f) Whether defendant, by the exercise of ordinary care, could have restored service prior to October 15, 1966 and, if so, on what date prior thereto.

(g) Whether and to what extent plaintiff suf-

ferred financial damage as a direct result of defendant's failure to provide freight service from May 12, 1966 to October 15, 1966, or -- in the alternative -- its failure to restore freight service as promptly as it might have done by the exercise of ordinary care.

(h) Whether and to what extent plaintiff might have reduced such damages by reasonable efforts to make other shipping arrangements.

VI.

Plaintiff expects to offer the following exhibits at the trial, with respect to which defendant has made no admissions:

(a) Photographs of the area in which the cave-in occurred.

(b) Plaintiff's 1965 and 1966 income tax returns.

(c) Compilations prepared by plaintiff's bookkeeper from plaintiff's records showing his investment in the sawmill at Elk River and comparisons of 1966 operating results with results in prior years.

(d) Letter of plaintiff's counsel to defendant, dated August 9, 1966.

(e) Defendant's reply to said letter dated August 30, 1966.

VII.

The witnesses known to plaintiff and expected to testify at the trial are as follows:

V. L. Johnson, plaintiff -- on all factual issues.

Gilbert Dahl, Elk River, Idaho (operator of small

cedar mill) -- on issues of suspension of service and statements of defendant with respect to restoration of service and reasons for delay in restoring service.

J. Emory Hall, Lewiston, Idaho (contractor) -- Expert witness on the issue of the time required to restore service.

Joe Holland, Bovill, Idaho (defendant's former station agent at Bovill) -- on issues of plaintiff's efforts to obtain freight service and advice given him by defendant as to restoration of service.

E. J. Sullivan, Spokane, Washington (defendant's freight traffic superintendent) -- on the issue of plaintiff's efforts to obtain freight service and advice given him by defendant as to restoration of service.

T. M. Pajari, Tacoma, Washington (defendant's division engineer) -- on issue of defendant's maintenance of the tunnel in question and efforts to restore service.

Bernadine Peters, St. Maries, Idaho (plaintiff's bookkeeper) -- on issue of plaintiff's damages.

Ed Chopot, Spokane, Washington -- expert witness on conditions in the lumber market throughout the 1966 season as related to the issue of plaintiff's damages.

VIII.

The following issues of law, and no others known to plaintiff, remain to be litigated upon the trial:

(a) Whether defendant had a duty to plaintiff to provide freight service and, if so, whether defendant breached such duty by suspending freight service.

(b) If defendant breached any such duty to plaintiff, what is the measure of plaintiff's damages?

(c) If defendant did not breach any duty to plaintiff by suspension of service alone, what duty, if any, did defendant owe plaintiff with respect to the proper maintenance of its equipment and railway line?

(d) Whether defendant breached any such duty owed by it to plaintiff.

(e) If such breach of duty is shown, what is the measure of plaintiff's damages resulting therefrom?

(f) Whether defendant owed any duty to plaintiff to restore service promptly after suspension and, if so, whether defendant breached such duty.

(g) If such duty and breach are shown, what is the measure of plaintiff's damages therefrom?

(h) It having been established that defendant is a common carrier and that freight service between Elk River and Bovill was suspended from May 12, 1966 to October 15, 1966, which party has the burden of proof on each of the foregoing issues?

(i) Whether plaintiff, if successful in establishing defendant's liability for damages, is entitled to attorneys fees.

IX.

The foregoing admissions having been made by the parties and the plaintiff having specified the foregoing issues of fact and law remaining to be litigated, this order shall

supersede the pleadings and govern the course of the trial of this cause, except to the extent modified prior to the trial upon application of either party.

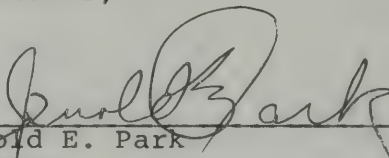
DATED this _____ day of March, 1967.

United States District Judge

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this 11th day of October, 1967.



Jerrold E. Park
Attorney

McFADDEN & PARK
St. Maries, Idaho
Attorneys for Appellant

No. 21998

IN THE
United States Court of Appeals
For the Ninth Circuit

V. L. JOHNSON, d/b/a V. L. JOHNSON LUMBER Co.,
Appellant,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD Co.,
Appellee.

APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

HONORABLE RAY McNICHOLS, *District Judge*

BRIEF OF APPELLEE

SIDNEY E. SMITH
117 South Fourth Street
P.O. Box 1148
Coeur d'Alene, Idaho 83814

B. E. LUTTERMAN
WARREN H. PLOEGER
JAMES E. NELSON
609 White Building
Seattle, Washington 98101
Attorneys for Appellee

FILED

JAN 31 1968

WM B LUCK CLERK

FEB 2 1968

SUBJECT INDEX

	<i>Page</i>
Statement of the Case.....	1
Argument of the Case.....	9
(1) Condemnation of Tunnel Not Due to Appellee's Negligence	10
(2) Upon Closure of the Tunnel, Appellee Had No Duty to Furnish Appellant Truck Transportation	13
(3) Appellee Renewed Service as Soon as Reason- ably Possible	16
(4) Appellant Failed to Prove Damages.....	17
Conclusion	17
Certificate of Compliance.....	18

TABLE OF AUTHORITIES

Table of Cases

<i>Atlantic Coast Line Ry. Co. v. Florida Fine Fruit Co.</i> , (1927) Fla., 112 S. 66.....	13
<i>B. & O. R. Co. v. O'Donnell</i> , 49 Oh.St. 489, 32 N.E. 476..	12
<i>James v. Davis</i> , (1922) Nebraska CCA, 280 Fed. 780....	13
<i>Midland Valley R. Co. v. Barkley</i> , (1928) 276 U.S. 482, 72 L.ed. 664, 48 S.Ct. 342.....	12
<i>Northwestern Consol. Milling Co. v. Chicago</i> <i>B. & Q. R. Co.</i> , (1917) Minn., 160 N.W. 1028.....	12
<i>Pacific Fruit & Product Co. v. Northern Pac. Ry. Co.</i> , (1920) 109 Wash. 481, 186 Pac. 852, 10 ALR 337....	12, 15
<i>Pennsylvania Ry. Co. v. Puritan Mining Co.</i> , (1915) 35 S.Ct. 484, 237 U.S. 121.....	11
<i>U.S. v. Leight Valley Ry.</i> , (1918) DC NY, 254 Fed. 332.....	14

	<i>Page</i>
<i>U.S. v. Union Stock Yard Co.,</i> (1912) 33 S.Ct. 83, 226 U.S. 286.....	14
<i>W. H. Blodget Co. v. New York Central Ry. Co.,</i> (1927) Mass., 159 N.E. 45, 55 A.L.R. 900.....	12

Statutes & Textbooks

9 Am.Jur. 644, §355.....	10-11
49 USCA, §41-43	14

IN THE
United States Court of Appeals
For the Ninth Circuit

V. L. JOHNSON, d/b/a V. L. JOHNSON LUMBER Co.,
Appellant,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD Co.,
Appellee.

APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT OF IDAHO,
NORTHERN DIVISION

HONORABLE RAY McNICHOLS, *District Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Although appellant's statement of the case is fairly extensive, it is inaccurate in some respects and not complete. For such reasons, it is felt that appellee should restate same.

It should be first noted that only five witnesses testified in the case: V. L. Johnson, the appellant; T. M. Pajari, the railroad's division engineer; Dennis J. Sullivan, the railroad's district manager of sales; Joseph J. Holland, the railroad's station agent at Bovill, Idaho; and William H. Glindenau, a lumber broker.

Appellee's railroad operates interstate from Seattle, Washington, to Chicago, Illinois. The main line passes through St. Maries, Idaho. A branch line extends from St. Maries to Bovill, Idaho, where it splits, one branch running from Bovill to Palouse, Washington, and a second branch line running from Bovill to Elk River, Idaho. It is this Bovill-Elk River branch line which is the subject of this litigation.

The Bovill-Elk River branch line is approximately twenty miles in length. This branch line serves three shippers at Elk River, namely, Gilbert Dahl, d/b/a North Idaho Cedar Company; V. L. Johnson, the appellant herein, d/b/a Johnson Lumber Co.; and the Diamond National Corporation. Diamond ships logs, Dahl shingles and Johnson lumber. Practically all of this movement is outbound.

The branch line in question was constructed about 1910. About four miles west of Elk River, it was necessary at time of construction to tunnel through a mountain. This tunnel is commonly known as the "Neva Tunnel." The shoring for such tunnel is timber.

Appellee railroad, of course, during the course of each year inspects and maintains all of its operating right of way facilities, including tracks, bridges, tunnels and stations (Tr. 64 and 65). Such inspection and maintenance included the Neva Tunnel (Tr. 65, l. 22). The railroad's division engineer, T. M. Pajari, would inspect the tunnel three or four times a year (Tr. 69, l. 25), the chief carpenter at least once a year, and in between the track forces and roadmaster as part of their normal duties would keep their eyes open for any unusual conditions (Tr. 70, l. 1), the same as other right of way facilities.

In 1954 and 1955, some new frames were placed and some old frames replaced in the tunnel (Tr. 66, l. 11). During the period 1954 through 1966, maintenance work as necessary was performed in the tunnel (Tr. 66, l. 19). In 1964 some work other than normal maintenance was contemplated but was not carried out because it was not considered necessary (Tr. 70, l. 9). Being a timber structure, the tunnel did, however, present maintenance problems (Tr. 44, l. 1). In 1954 and 1955 negotiations were carried on between the railroad and the State of Idaho Highway Department with the idea of putting a cut through the hill, eliminating the tunnel, and relocating both the road and the railroad tracks running to Elk River through such cut, with the cost being shared by the railroad and the state. The railroad was interested in the cut since it would eliminate tunnel maintenance (Tr. 67, l. 4). However, because no mutually satisfactory agreement could be arrived at between the railroad and the state (Tr. 67, l. 11) and because the repairs done at that time were sufficient to continue the line in service, negotiations were terminated (Tr. 86, l. 1). Late in 1965, the Idaho Department of Highways contacted the railroad about the contemplated joint venture of open-cutting the tunnel for both rail and highway service (Tr. 59, l. 11 Tr. 86, l. 1). Division engineer T. M. Pajari was instructed by the railroad to review the matter in the field and to advise his superiors in this regard (Tr. 86, l. 1). The railroad had already made a basic survey of the contemplated cut in 1954, when the matter was first discussed with the state (Tr. 81, l. 3).

During the period 1954 to April of 1966, the tunnel was in operation and the railroad's trains were running

through it (Tr. 70, l. 11). On April 1, 1966, railroad carpenter Hanson advised T. M. Pajari, division engineer, that there was some work to be done on the frames at the west end of the tunnel. A crew was to be dispatched to do such work (Tr. 55, l. 25).

While the crew was on the ground doing the work on April 12th, a slide took place in the said west end of the tunnel (Tr. 56, l. 20). The five to ten frames involved were replaced (Tr. 58, l. 1), the debris cleaned up, and the tunnel opened for railroad operations on April 15th (Tr. 69, ll. 4, 17).

On May 12, 1966, railroad division engineer T. M. Pajari received a telephone call that a serious new condition had developed in the tunnel (Tr. 70, l. 24), and he immediately went to the site and inspected same. Inspection disclosed a massive movement of earth and rock above the tunnel (Tr. 71, l. 22), which could be likened to a localized earthquake (Tr. 97, l. 20). It was definitely a different condition than previously (Tr. 71, l. 21), and a type of earth and rock movement which had never before occurred (Tr. 72, l. 3). Whereas previously there might have been a normal failure of timbers because of age, moisture and so forth, this was actually a separation of the fibers of the timbers (Tr. 72, l. 7). Inspection further disclosed that 90 percent of all segments in the tunnel had new cracks or additional openings in old cracks (Tr. 71, l. 5). They were both in the vertical and horizontal plane. The tunnel lining was also displaced. Most of the movement in the tunnel had taken place in the past week (Tr. 74). In regard to foreseeability, Mr. Pajari testified (Tr. 95, l. 24):

"Q. Was that a condition that could have been anticipated?

"A. I don't think so."

And on page 98, l. 25, in answer to a question propounded by appellant's attorney, he further testified:

"Q. With respect to the tunnel the conditions that existed there were reported to you and others in 1964, and going back over the years the reference to the rotten condition of the timber bents, whatever they are, and the general problem of the lining of the tunnel and things, you could anticipate could you not, that some day the tunnel might collapse, couldn't you?

"A. No, not on the basis of our maintenance operations and inspections."

There had never been this type of movement of earth and rock prior to May 12, 1966 (Tr. 72, l. 3). Following inspection on May 12th, upon the division engineer's initiative, the tunnel was closed. Use of the tunnel by trains in such condition would jeopardize lives and equipment (Tr. 77, ll. 16, 20).

The railroad was anxious to remedy the situation as soon as possible. Having netted revenue of at least \$36,000 from Elk River in 1965, closure of the line meant loss of money to the railroad (Tr. 118, l. 3; Tr. 95, ll. 2, 8).

Three alternatives were presented to remedy the situation (Tr. 78, l. 16); (1) All 130 of the timber frames could be replaced with new timber frames. This would be a delicate, dangerous operation to workmen (Tr. 78, l. 15), and would take a minimum of three to four months to complete after men and equipment were on the site (Tr. 80, l. 10; Tr. 96, l. 9). (2) The timber frames could be replaced with concrete frames. This also would be a

delicate, dangerous operation to workmen (Tr. 78, l. 15) and would take a minimum of five to six months to complete (Tr. 96, l. 9). (3) The third alternative was elimination of the tunnel and replacement with a cut. This would be a more permanent improvement, since it would eliminate the maintenance problem (Tr. 79, l. 14). Such work would ordinarily take at least five to six months (Tr. 79, l. 22).

After study, it was decided to eliminate the tunnel and to jointly participate with the highway department of the State of Idaho in a cut for both rail and road use (Tr. 92, l. 17). Much work was involved. Surveys had to be completed by both parties (Tr. 81, l. 15), land purchased (Tr. 83, l. 15), and plans and specifications prepared (Tr. 83, l. 1). Because it involved expenditure of a considerable sum of money, the railroad had to have approval by its head office (Tr. 80, l. 19) and the State Highway Department had to get commission approval (Tr. 82, l. 8). When such preliminary work was completed, excavation bids were advertised on July 22nd (Tr. 82, l. 17), and the excavation bid let to Morrison-Knudsen Company on August 15th. The contract between Morrison-Knudsen and the parties was formalized August 17th, and excavation work was commenced August 23rd and was completed October 14th (Tr. 94, l. 1). During and after completion of the excavation work, the railroad itself installed the tracks (Tr. 94, l. 7). The total excavation cost was \$178,-971.95, of which the state contributed \$68,950.65, not including the cost to the railroad for installation of track and grading (Tr. 95). The Bovill-Elk River branch was re-opened for business October 17, 1966. The tunnel was closed to traffic a total of five months.

It should be noted that whether this work connected with the cut, or new timber shoring or concrete shoring installed in the tunnel, had been done in 1954, 1966, or any other time, it necessarily would have to be done in the summer months. The Elk River area has about four months of good weather a year. During the other eight months there is mud and snow on the ground (Tr. 32, ll. 9, 12, 22). Any work of this type would have to be carried out during the summer months (Tr. 79, l. 17; Tr. 96, l. 21).

Appellant brought this action seeking recovery of alleged lost profits due to his alleged inability to ship lumber by rail from Elk River during the five months the tunnel was closed and rail service suspended.

Turning to V. L. Johnson, the appellant herein, it should be noted that both he and Gilbert Dahl were informed by the railroad's agent at Bovill, Joseph J. Holland, the morning of May 13, 1966 . . . the day following the closing of the tunnel . . . that the tunnel was condemned and rail service suspended (Tr. 134, l. 20). Appellant asked Mr. Holland as to how long the tunnel would be closed, and Mr. Holland was unable to tell him since he didn't have the slightest idea as to the extent of damage or how long it would take to correct the situation (Tr. 136, l. 4). During the period service was suspended, appellant and Mr. Holland had several conversations in this regard, and Mr. Holland was never able to tell him when service would be restored for the reasons mentioned (Tr. 142, l. 14). Appellant called Dennis J. Sullivan, the railroad's manager of sales, in this regard, and Mr. Sullivan also told him that he did not know for sure when service would be restored (Tr. 111, l. 15).

From "hearsay," Mr. Johnson concluded that service would be restored in July or on July 15th (Tr. 165, l. 9), but such misinformation was never given him by Mr. Holland nor by Mr. Sullivan . . . the only two people on the railroad with whom appellant talked.

The railroad had no agent at Elk River, and bills of lading were normally issued by the Bovill agent, Mr. Holland, to Elk River shippers (Tr. 133, l. 19). Knowing that the agent at Bovill would not accept a bill of lading, appellant, or someone on his behalf, went to Plummer, Idaho, later during the day of May 13th and got the railroad agent at such station to accept a bill of lading for one car of lumber (Tr. 152, l. 25; Tr. 153, l. 1). The agent at Plummer at such time did not know of the closing of the tunnel. Because a bill of lading is a contract, the railroad was obligated to move this one car load, and hired a common trial carrier, the Garrett Auto Freight Company, to move it (Tr. 149, l. 1).

In his statement of facts, appellant alleges that no other common carriers served Elk River. This is incorrect. A highway connects Elk River and Bovill. As mentioned in the previous paragraph, Garrett Auto Freight served Elk River (Tr. 155, l. 2). Appellant himself moved a load of lumber by truck common carrier to Denver the summer of 1966 (Tr. 11, l. 19). Appellant knew of two truck line common carriers who could haul from Elk River to rail site at Bovill, where there was no loading platform, or to rail site in St. Maries, where there was a loading platform (Tr. 25, l. 25; Tr. 30, l. 24). The record also indicates that 50 percent of the produce of Gilbert Dahl moved by truck common carrier even be-

fore the closing of the tunnel (Tr. 37, l. 1). Appellant made very little effort to discover other common carrier truckers (Tr. 27, 28). The only reason that appellant chose not to move his produce by truck was because such service was more expensive than rail (Tr. 29). In this regard, he made no effort whatsoever to mitigate his alleged damages. Instead, appellant chose not to move his produce and waited to sue the railroad for alleged damages.

At trial level, after appellant had completed his case, the trial judge concluded that the railroad's closing of the tunnel was due to an unusual massive movement of earth, and not through the negligence of appellee; that after closing, the railroad acted reasonably in its procedure to reinstate rail service; that appellant had not proved damages by a reasonable measure; and granted appellee's motion to dismiss the action. It is submitted that the trial court's conclusions and ruling should be sustained.

ARGUMENT OF THE CASE

Summarizing appellant's many arguments, it appears that he only seriously contends that the trial court erred in granting appellee's motion to dismiss on basically four grounds: (1) that the condemnation of the tunnel was due to appellee's negligence in maintenance; (2) that even if the closure was not due to appellee's negligence, appellee had a duty to truck out appellant's produce . . . or at least participate in paying freight charges for appellant . . . since rail service wasn't available; (3) that appellee was negligent in not sooner restoring rail service; and (4) that appellant proved damages.

There is no evidence whatsoever in the record to support his arguments in these regards.

These points will be answered separately and more fully under each of these headings.

(1) Condemnation of Tunnel Not Due to Appellee's Negligence

Only one witness testified on the cause of the condemnation of the tunnel, T. M. Pajari, appellee's division engineer.

As earlier pointed out, Mr. Pajari stated that the tunnel closing on May 12, 1966, was due to a massive movement of earth and rock above the tunnel (Tr. 71, l. 22) which could be likened to a localized earthquake (Tr. 97, l. 20). There had never been a movement of this type before May 12, 1966 (Tr. 72, l. 3). It was a different condition than he had ever previously observed (Tr. 71, l. 21), and a type of earth and rock movement which had never before occurred (Tr. 72, l. 3). It was a condition that could not have been anticipated nor foreseen (Tr. 95, l. 24; Tr. 99, l. 1).

The right of a shipper to cars and service is not an absolute right and a carrier is not liable if it fails to furnish cars where such failure is due to unusual conditions making such impractical or impossible. Such is a complete defense to any action by a shipper.

For instance, a car shortage can be a complete defense to any action by a shipper for damages for failure to supply cars. As the general rule is stated in 9 Am. Jur., §355 (page 644):

"The rule is well settled that, while railroad com-

panies are bound to furnish a sufficient number of suitable cars for their usual and ordinary traffic, and to make reasonable efforts to meet such increased demand for cars as should be foreseen, their failure to furnish cars, in the absence of a special contract, may be excused by a car shortage occasioned by an unusual and unexpected demand therefor which could not reasonably be anticipated, as, for instance, where there is a sudden and unusual demand for stock or produce in the market, or where an unusual influx of freight arises from an excessive crop greater than the estimates made either by the railroad or by experts most familiar with crop conditions. . . . Also, if a carrier is unable to furnish cars at the time demanded without suffering an undue interference with its business or with the rights of other shippers, it may show such fact in defense of an action to hold it liable for losses occasioned by its neglect to furnish transportation. It must also be borne in mind, in this connection, that a common carrier is not bound by its general public obligation to provide other means of transportation than such as it owns and uses or holds out to the public on its own route for that purpose. . . .” (Emphasis supplied)

As this rule is stated in *Pennsylvania Ry. Co. v. Puritan Mining Co.*, (1915) 35 S.Ct. 484, 237 U.S. 121:

“Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier’s line. But this is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that he was not liable for failing to transport more than he could carry. . . . The law exacts only what is reasonable from such carriers—but, at the same time requires that they should be equally reasonable in the treatment of their patrons.”

Also see *Midland Valley R. Co. v. Barkley*, (1928) 276 U.S. 482, 72 L.Ed. 664, 48 S.Ct. 342. Such inability to supply cars because of a shortage of cars due to an unforeseen demand absolves the carrier from the duty of furnishing them on the demand of a shipper, although its published tariff gives rates for transportation in such cars. *Pacific Fruit & Produce Co. v. Northern P. R. Co.*, (1920) 109 Wash. 481, 186 Pac. 852, 10 A.L.R. 337.

Congestion of traffic on a line is a valid excuse for failing to furnish a shipper with cars. *W. H. Blodget Co. v. New York Central Ry. Co.*, (1927) Mass., 159 N.E. 45, 55 A.L.R. 900.

An act of God in destroying property already in transit is a defense to any action against a carrier by a shipper for loss of same. *Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co.*, (1917) Minn., 160 N.W. 1028. Likewise, an act of God preventing a carrier from furnishing cars, upon request, to a shipper is a defense. As the court stated in the tunnel case cited by appellant in his brief, *B. & O. R. Co. v. O'Donnell*, 49 Oh. St. 489, 32 N.E. 476, in approving the following instruction (page 480):

“The instructions of the court upon this issue were to the effect that, if the tunnel was rendered impassable for cars, the defendant was excused from making delivery until the obstruction was cleared. . . . No exception was taken to this part of the charge (instruction), and it appears entirely unobjectionable.” (Insert supplied)

In the case at hand, there is no evidence whatsoever that the movement of earth and rock above the tunnel, resulting in the tunnel's closure, could reasonably have been foreseen or anticipated by the railroad. The evi-

dence, to the contrary, clearly shows that such had never before occurred, was likened to a localized earthquake, and could not be anticipated. Such was in the realm of an act of God, and is a valid defense to any action by appellant. It is submitted that the trial court was correct in so concluding.

(2) Upon Closure of the Tunnel, Appellee Had No Duty to Furnish Appellant Truck Transportation

In his brief, appellant repeatedly alleges that even if the condemnation of Neva Tunnel was not due to the railroad's negligence, the railroad had the duty during the period service was suspended to either truck appellant's produce out of Elk River or to participate in paying a common truck carrier to perform such service. Such argument is entirely without merit.

The appellee is in the railroad business, not the trucking business (Tr. 118, l. 13). In order to operate trucks, the I.C.C. must grant authority or rights to so operate in a particular area, and, of course, the applicant must own trucks. Appellee has no trucking authority or rights in Idaho (Tr. 118, ll. 20, 23; Tr. 119, l. 1), and owns no trucks (Tr. 119, l. 4; Tr. 123, l. 2).

It is well-established law that a carrier is not required to furnish means of transportation other than it owns or holds out to the public on its route. *Atlantic Coast Line Ry. Co. v. Florida Fine Fruit Co.*, (1927) Florida, 112 S. 66; *James v. Davis*, (1922) Neb. C.C.A., 280 F. 780. Because appellee owned no trucks, had no truck route authority, and did not hold itself out as a common carrier in the trucking business, appellee had no duty to furnish appellant with truck service during the period rail service was suspended.

As far as participating with appellant in paying a common truck carrier to haul his produce from Elk River during the period rail service was suspended, such would be a violation of the Elkins Act, 49 U.S.C.A. §§41-43, and illegal. As appellant testified, truck rates are higher than rail rates. For appellee to participate in payment of same would be unlawful. Such would be discrimination against the other Elk River shippers and every other shipper in the area subject to the railroad's published tariff. Participating in payment of truck rates would mean that appellant would ship goods at less than the established truck tariff. The purpose of the Elkins Act was to make it a criminal offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to transportation of property at a rate less than that named in the published tariff or whereby some other advantage is given or discrimination practiced. *U.S. v. Union Stock Yard Co.*, (1912) 33 S.Ct. 83, 226 U.S. 286. Even the mere act of appellant requesting such participation makes him guilty of a misdemeanor. Likewise, the mere offer of the railroad to so participate would make it guilty of a misdemeanor. *U. S. v. Leight Valley Ry.*, (1918), D.C.N.Y., 254 Fed. 332.

Along this same line, and as another arguing point, appellee mentions in his brief that although he could have found a common truck carrier to haul his produce to the Bovill rail site, there was no loading platform at such site. At Elk River, appellant himself loaded rail cars left on his industrial siding with a fork lift truck he owned. He could have loaded rail cars in Bovill with this fork lift truck, which necessitated hauling it to and from Elk River, or by renting a fork lift truck to keep in Bovill

during the time service was suspended. Appellant did not want to take his fork lift to Bovill each time, since it inconvenienced him (Tr. 30, l. 10), nor to rent a second fork lift truck, since such would cost him money (Tr. 30, l. 14). Instead, in his brief, he states that the railroad should have rented one for his use at Bovill. Such argument is also without merit.

Under the railroad's published tariff used by appellee for movement of lumber, shippers provide their own labor and own machines for loading railroad cars (Tr. 150, l. 11; Tr. 151, ll. 2, 6). Appellant loaded the railroad cars placed on his siding at Elk River, not the railroad. For the railroad to have rented and furnished appellant with a fork lift truck in Bovill would also have been a violation of the Elkins Act since such was not provided for in the railroad's published tariff. As it stated in *Pacific Fruit & Produce Co. v. Northern P. R. Co.*, *supra*, at page 487:

"A carrier in interstate commerce can enter into no contract of transportation for which there is not express authority in its filed and published tariffs. *Texas & Pacific R. Co. v. American Tie & Timber Co.*, 234 U.S. 138."

The evidence in the case clearly shows that the published tariff of the railroad did not include fork lift usage (Tr. 120, l. 1), and that furnishing one would result in both the railroad and shipper being penalized by the I.C.C. (Tr. 120, l. 16). There is no evidence whatsoever in the record to the contrary.

It is submitted that appellant's arguments about the railroad having a duty to furnish a truck, or to participate in paying common carrier truck rates with him, or to furnish him with a fork lift in Bovill, are totally without merit and entitled to no consideration whatsoever.

(3) Appellee Renewed Service as Soon as Reasonably Possible

Only one witness testified on the subject of whether or not appellee restored rail service to Elk River as soon as reasonably possible, T. M. Pajari, the railroad's division engineer.

As was earlier pointed out in this brief under Statement of Fact, upon condemnation of the tunnel, three alternative methods were available to remedy the situation: (1) all 130 of the timber frames could be replaced with new timber frames, which would take a minimum of three to four months; or (2) the timber frames could be replaced with concrete frames, which would take five to six months; or (3) the tunnel could be eliminated and replaced with a cut, which would take at least five to six months. the latter method was selected since it was the more permanent type of improvement, and would reduce maintenance work.

As was also previously mentioned in the Statement of Facts, no matter when this work had been undertaken, it would have had to be done during the summer months (Tr. 96, l. 22). The Elk River area has only four good summer months a year, and the other eight months the ground is muddy or there is snow on the ground (Tr. 32, ll. 9, 12, 22).

Completing the work and renewing service within five months, considering the nature of the work, the parties involved, and the immensity of the job, was a task well done in the opinion of Mr. Pajari (Tr. 96, l. 12).

In the case under consideration, there is no evidence whatsoever that the job to be done under the circum-

stances could have been done more expeditiously, nor that the railroad did not act reasonably under the circumstances. It is submitted that the trial court was correct in reaching such a conclusion.

(4) Appellant Failed to Prove Damages

In regard to appellant's argument in this regard, it is felt that the trial court's expressed opinion very adequately covers and answers appellant's argument, and needs no addition thereto (Tr. 183 and 184). It is submitted that the trial court was correct in its statements and conclusions.

CONCLUSION

The record of the lower court's proceedings discloses no evidence whatsoever supporting appellant's arguments. The facts are clear that the closing of the tunnel and suspension of rail service for five months was not the fault of the railroad, and that the railroad acted reasonably in restoring service. Not one witness testified to the contrary. Reasonable minds could not differ under the circumstances, and the trial court was correct in sustaining appellee's motion to dismiss at the conclusion of appellant's case.

Respectfully submitted,

SIDNEY E. SMITH
117 South Fourth Street
P.O. Box 1148
Coeur d'Alene, Idaho 83814

B. E. LUTTERMAN
WARREN H. PLOEGER
JAMES E. NELSON
609 White Building
Seattle, Washington 98101
Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. NELSON
of Attorneys for Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

V. L. JOHNSON, d/b/a V. L.)
JOHNSON LUMBER CO.,)
Appellant,)

vs.

No. 21998

CHICAGO, MILWAUKEE, ST. PAUL)
& PACIFIC RAILROAD CO.,)
Appellee.)

APPELLANT'S REPLY BRIEF

FILED

FEB 27 1968

WM B. LUCK CLERK

*Appeal from the United States District Court
for the District of Idaho, Northern Division*

HONORABLE RAY McNICHOLS
District Judge.

McFADDEN & PARK

St. Maries, Idaho 83861
Attorneys for Appellant.

MAR 1 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

V. L. JOHNSON, d/b/a V. L. JOHNSON LUMBER CO.,
Appellant,

VS.

No. 21998

CHICAGO, MILWAUKEE, ST. PAUL)
 & PACIFIC RAILROAD CO.,)
)
 Appellee.)

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Idaho, Northern Division

HONORABLE RAY McNICHOLS
District Judge.

McFADDEN & PARK

St. Maries, Idaho 83861
Attorneys for Appellant.

SUBJECT INDEX

Response to Appellee's Factual Statement	1
Response to Appellee's Argument	7
Appellee's Negligence	8
Substitute Service	14
Reinstatement of Service	16
Damages	19
Conclusion	20

TABLE OF AUTHORITIES

Cases

Adams Express Co. v. Croninger (1913) 226 U.S. 491, 33 S Ct 148.	8
Bell Lumber Co. v. Bayfield Transfer Ry. Co., (Wis.) 172 NW 955.	13
New York Central RR Co. v. Lockwood (1873) 84 U.S. (17 Wall.) 357, 21 L ed. 627 . . .	13
Secretary of Agriculture v. U. S. (I.C.C.), 350 U.S. 162, 100 L. ed. 173.	8
U. S. Express Co. v. Kountze Bros. (1869) 75 U.S. (8 Wall.) 342, 19 L ed. 457. . . .	13

Statutes

49 USCA Sec. 1(15) - 1(20)	15
--------------------------------------	----



APPELLANT'S REPLY BRIEF

RESPONSE TO

APPELLEE'S FACTUAL STATEMENT

The appellee railroad company asserts in its Statement of the Case that appellant's factual statement is inaccurate, but in attacking the only specific inaccuracy which appellee purports to find, appellee itself misstates the record. At page 8 of its brief, the appellee says that "appellant alleges that no other common carriers served Elk River." In fact, what we said (appellant's brief, p. 3) was "Defendant is the only rail carrier serving Elk River and the only common carrier hauling lumber from Elk River." These statements are borne out by the record, (Tr. p. 6, l. 8-11) although we recognize that on one occasion, after the termination of the rail service, defendant hired Garrett Auto Freight Company to haul one carload of plaintiff's lumber from Elk River to Bovill. Whether this was done on a common carrier basis or a special contract, the record does not show. With this possible exception, there is no evidence whatever that any common carriers other than appellee were hauling lumber from Elk River.

Appellee attempts to suggest that truck carriage of lumber out of Elk River was readily available and that a substantial quantity of lumber moved that way. Its brief states (pp. 8-9) that Gilbert Dahl moved fifty percent of the produce of his

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

By JOHN BURNET, BISHOP OF SALISBURY.

LONDON, Printed by J. Streater, at the Sign of the Gun, in St. Dunstons Church-yard, 1679.

THE HISTORY OF THE REIGN OF CHARLES THE FIRST, BY JOHN BURNET, BISHOP OF SALISBURY. This work is a detailed account of the reign of Charles I, from 1625 to 1649. It covers the political, religious, and military events of the period, including the English Civil War and the execution of the king. The author, John Burnet, was a prominent 17th-century English historian and theologian. The book is written in a clear, concise style and is considered one of the most important works on the reign of Charles I.

mill by truck common carrier even before the closing of the tunnel. But the testimony was (Tr. p. 37) that Dahl shipped fifty percent of his produce (which was not lumber) by truck, but some -- if not all -- of it went in his own truck. Whether any of it went by common carrier or even by contract carrier does not appear from the record.

Appellee then continues (p. 9) with one of the sweeping generalizations with which its brief abounds, charging that Johnson "made no effort whatsoever to mitigate his alleged damages." The record belies this statement. He tried shipping by truck to Denver and found that he could not do so except at a substantial loss; he hauled a few carloads of lumber to Bovill for loading and shipping by rail, which necessitated shutting down his sawmill operation and hauling a lift truck back and forth; he contacted numerous sources, including the Interstate Commerce Commission, in an effort to make economically feasible transportation arrangements for his lumber; he made numerous requests and demands upon the railroad for hauling assistance to Bovill or loading assistance at that point. (Tr. pp. 9-12, 24-30) As the record amply shows, appellee's statements that Mr. Johnson made no effort to mitigate his damages and that instead he "chose not to move his produce and waited to sue the railroad for alleged damages" are demonstrably erroneous.

That the appellant was not more successful in mitigating his damages was due to the lack of information and the misinformation given him by the railroad regarding the probable duration of the suspension and the failure or refusal of its

employees to obtain an accurate estimate of the date of resumption of service despite his repeated requests. (Tr. pp. 38-41)

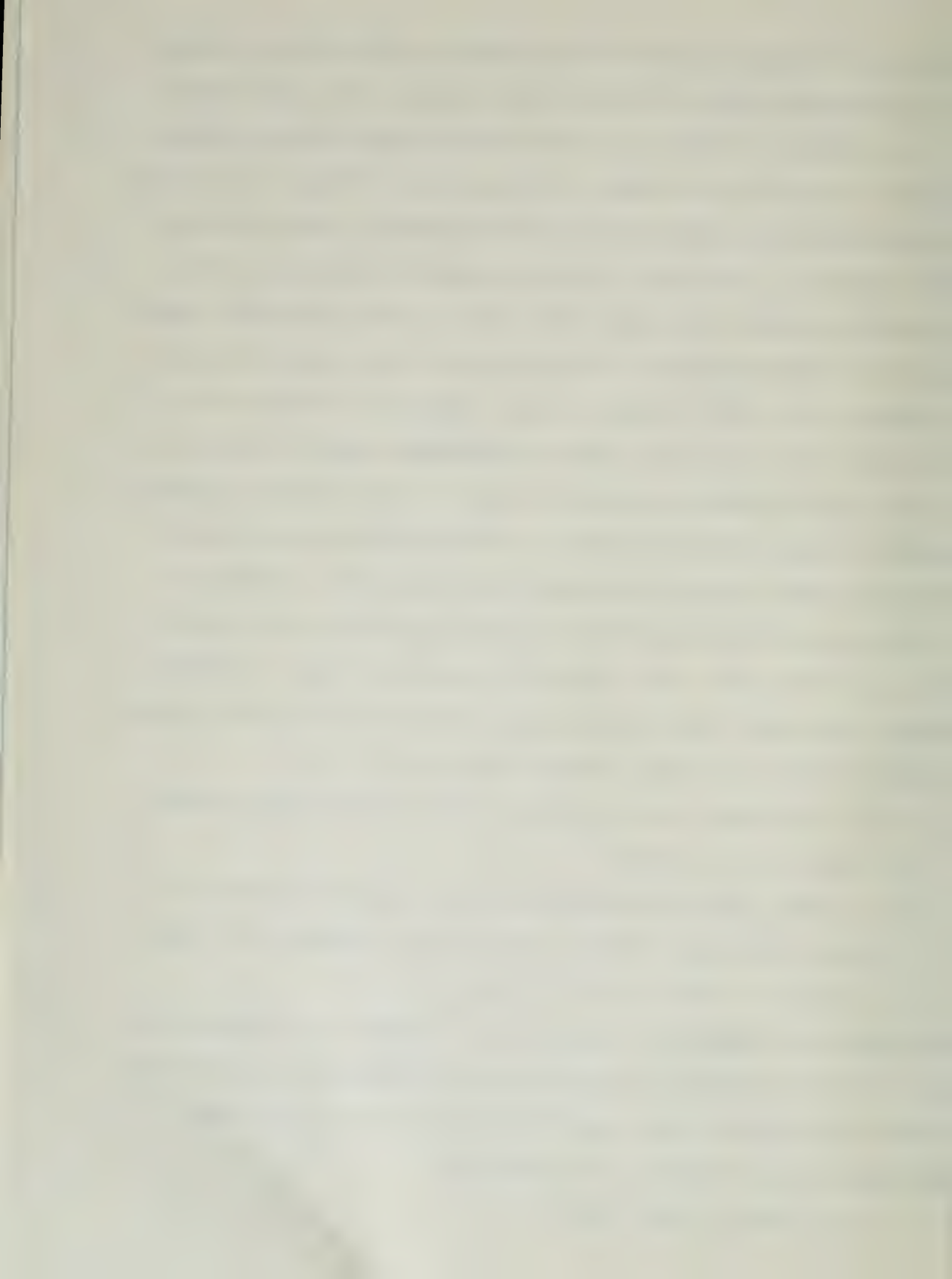
Another of appellee's unfounded generalizations appears at page 3 of its brief, where it is said that "During the period 1954 through 1966, maintenance work as necessary was performed in the tunnel." In support of this statement appellee refers to page 66 of the transcript, line 19, at which point Mr. Pajari testified that maintenance was performed in the tunnel during the period from 1954 to April, 1966. Appellee continues "In 1964 some work other than normal maintenance was contemplated but was not carried out because it was not considered necessary." Appellee infers and would have the Court believe that normal maintenance was carried out during 1964 and 1965 and that it was only some extraordinary job which the railroad decided not to do in those years. Mr. Pajari's testimony leaves no doubt, however, that *the railroad did no maintenance work on the tunnel in 1964 or 1965.* His own counsel asked him:

"Q. Was there any maintenance work itself during those years do you know?

A. We had some maintenance work planned according to the record but did not consider it necessary to carry it out." (Tr. p. 70, l. 7-12)

And when cross-examined by appellant's counsel with respect to the railroad's answers to written interrogatories propounded to it by the plaintiff (Rec. pp. 46-53), Mr. Pajari testified -- with apparent reluctance -- as follows:

"Q. Which is the fact?



"A. I beg your pardon?

Q. Which is the fact -- did you or did you not do maintenance work in 1964 and 1965?

A. What is the question?

THE COURT: The witness previously indicated there was work done in 1964. Counsel is asking him if that is accurate.

A. Apparently on my research I didn't take this seriously and eliminated it, so I will say that the interrogatory is correct for this purpose.

Q. The interrogatories are correct?

A. Yes, sir.

Q. Indicating at any rate that no maintenance or repair work was done in 1964 or 1965?

A. *That's right, yes, sir.*" (Tr. p. 50, l. 13 - p. 51, l. 4)

We must take issue also with that part of appellee's Statement of the Case (p. 4) which relates to the closing of the tunnel. It is said that "Pajari received a telephone call that a serious new condition had developed in the tunnel." Appellee is anxious to suggest that this was a new condition, recognized as such by many of the railroad's employees, but Pajari's testimony was that he received a telephone call "stating that a serious development had taken place." (Tr. p. 70, l. 26)

In this same vein appellee refers to isolated fragments of testimony -- more or less out of context -- which might be thought to imply that the partial collapse of the tunnel or shifting of its lining resulted from some unprecedented and

unforeseeable natural disaster. With regard to foreseeability, appellee's brief points out (p. 5) Mr. Pajari's testimony as follows:

"Q. Was that a condition that could have been anticipated?

A. I don't think so."

The Court will observe, however, that this question and answer are followed immediately (Tr. p. 95, 1.25) by the following:

"Mr. Park: I object to that as calling for a conclusion.

That is one of the main issues in this [case].

The Court: *Sustained.*"

Appellee quotes some more of Pajari's testimony on the issue of foreseeability (p. 5) which seems to indicate that it was Pajari's opinion that the partial collapse -- or whatever it was -- that made necessary the closing of the tunnel could not have been anticipated. But the whole of his testimony on this issue gives quite a different impression. For example:

"Q. I believe you testified that this [phenomenon which allegedly caused the trouble in the tunnel] occurs everywhere; is that right?

A. Yes, this occurs and is due to natural forces.

Q. This is something that must be expected; is that correct?

A. Yes.

Q. And it is something that can be anticipated?

A. Except as to location of occurrence.

Q. Pardon me?

A. Except as to location of occurrence.

Q. You don't know exactly when and where it is going

"to happen but something you can expect -- if you have a tunnel going through a mountain, you can expect sometime it is going to collapse?

A. Not necessarily, but it may collapse.

Q. *This is a phenomenon which can be expected? In other words, it is not something which is completely unanticipated?*

A. *That is right.*" (Tr. p. 98, l. 5-24)

Appellee devotes several paragraphs of its brief (pp. 5-7) to the details of the "daylighting" job, in an effort to show that the railroad exercised admirable diligence in restoring service. As shown later herein, this effort fails because the railroad not only could have foreseen but did foresee the necessity of either daylighting the tunnel or doing a major overhaul on it and because -- even if the closing of the tunnel had been conclusively proved to have been the necessary and unavoidable result of an act of God -- the railroad, as a common carrier charged with a public trust, would not have been justified in causing its shippers substantial loss by delaying the reinstatement of service while it negotiated with the State merely to save itself some money. We have no particular quarrel with the appellee's statement of the facts on this phase of the controversy; we would only point out that, as appellee says (p. 6), "excavation work was commenced August 23rd and was completed October 14th." Thus, assuming that the road would have had to be closed throughout all of the excavation work -- which may or may not have been the case -- this would have

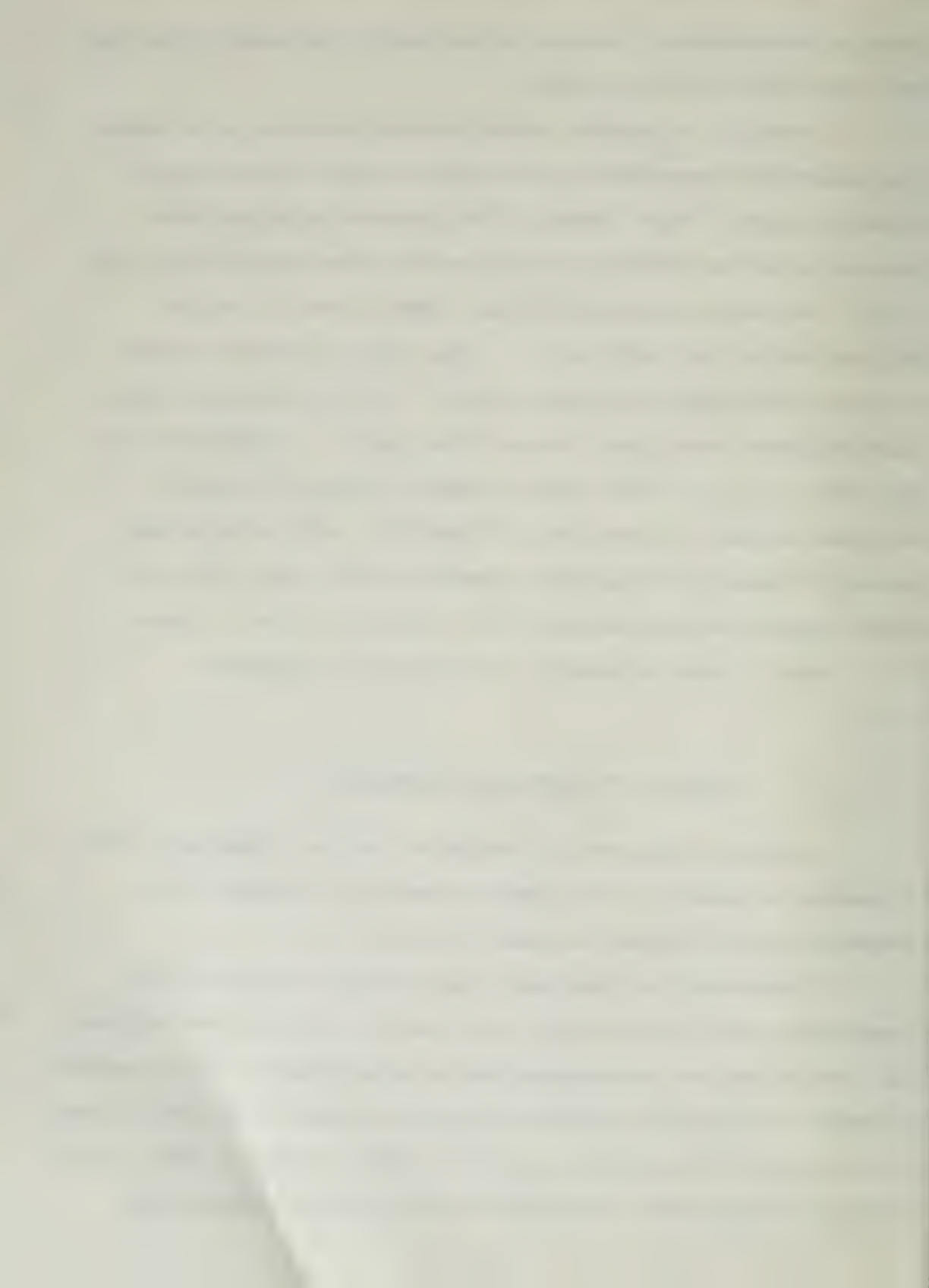
meant a suspension of service of one month and twenty-four days, not five months and five days!

Finally, we cannot resist chiding appellee a bit about its indignant assertions at the top of page 8 of its brief. Appellee says: "From 'hearsay' Mr. Johnson concluded that service would be restored in July or on July 15th (Tr. p. 165, l. 9), but such misinformation was never given him by Mr. Holland nor by Mr. Sullivan . . . the only two people on the railroad with whom appellant talked." It is not at all clear that Sullivan never gave Johnson this date -- Johnson says he did (Tr. p. 9, l. 10-16) and we find no point at which Mr. Sullivan denied it. (See Tr. p. 109-110). But, more to the point, it seems to be crystal clear that *the real source of this "hearsay misinformation" was a letter (P. Ex. 3) from J. J. Nentl, Superintendent of the appellee railroad!*

RESPONSE TO APPELLEE'S ARGUMENT

Appellee disposes of the major part of appellant's affirmative argument by the simple expedient of purporting to believe that we are not serious about it.

Thus appellee does not even attempt to dispute our contention that the railroad was liable to Johnson for failing to provide him the transportation services which, by its tariffs, it held itself out to provide, unless it proved that its failure to do so was due solely to an act of God, whether or not it was guilty of negligence. Appellee either fails or refuses to



recognize any distinction between this liability and the usual liability which results from an injury proximately caused by a defendant's negligence. But, as shown in considerable detail in our affirmative brief, a common carrier's liability arises out of his public trust and need not be shown by the shipper to have resulted from the carrier's negligence. Secretary of Agriculture vs. U.S. (I.C.C.), 350 U.S. 162, 100 L ed. 173, 76 S Ct. 244; Adams Express Co. vs Croninger (1913), 226 U.S. 491, 33 S Ct. 148. (See also, Appellant's Brief, Section IV).

The burden was on the railroad to prove not only that the closing of the tunnel was necessary and that it made the continuation of service to Elk River *impossible*, but also that the closing resulted solely from an act of God which was not and could not have been foreseen and could not have been prevented or avoided. These things appellee did not prove at the trial even by a preponderance of the evidence! Of necessity, therefore, appellee pretends that we are not serious about all that -- all we seriously contend, they say, is that the railroad was "negligent in maintenance."

Consequently, the well-recognized legal principles and undisputed facts set forth in our affirmative brief in support of appellant's basic position stand unassailed.

(1) Appellee's Negligence.

Without conceding for a moment, however, that the railroad's liability herein depends upon a showing of its negligence, we have no hesitation about meeting appellee on this ground, for evidence from which the jury might reasonably have found such negligence is abundant in the record in this case. To

and testimony is admitted in the record in this case. In
on evidence that which the jury must determine is what
to have no hesitation about finding admitted in this record.
and is finally shown to be a fact in the case.

recall only part of that evidence: For eleven years, at least, only temporary, "stop-gap" repairs were made in the tunnel -- placing replacement braces on the "rotten original lining" that could not form a solid backing for them -- trying to "make the tunnel safe for another year or two [from 1955] until we could consummate a deal with the State for daylighting . . ." (Tr. p. 140, l. 19, P. Ex. 5, 10, 17) Recommendations of its own engineers for permanent repair or elimination of the tunnel were disregarded until after it had finally collapsed, for the last time, and had to be condemned. (Tr. pp. 44, 47, 67, 86, P. Ex. 16) Maintenance planned for 1964 was not carried out in that year or the next, even though the section foreman reported June 30, 1964 that the timbers were falling out, the situation was getting worse, and the tunnel was "coming down." (Tr. p. 53, l. 23 - p. 54, l. 25) If this would not have supported a finding by the jury that the railroad was negligent in its maintenance of the tunnel, it is hard to imagine what would.

But appellee -- with admirable discretion -- makes no real effort to deny its negligence. Rather it relies entirely upon an alleged absence of proximate causation; and, unfortunately for appellant, the trial court accepted this specious defense, to the total exclusion of virtually all other considerations.

In this connection, appellee, at page 10 of its brief, again recites those portions of Mr. Pajari's testimony which seem to indicate that the condition which resulted in the

decision to condemn the tunnel was a sudden, unprecedented movement of earth and rock which could not have been anticipated or guarded against. As shown earlier herein and in our affirmative brief (pp. 47 - 54) there was substantial conflict in the evidence on this point. Defendant's answer alleged that service was suspended because of a cave-in, and this was what the Assistant General Manager reported to the General Manager and was the way the problem was usually described. (P. Ex. 13, 14, Tr. pp. 62, 63) Mr. Pajari said at the trial that it was due to a "shifting of the earth and rock and of the tunnel itself", or "a displacement of the *lining of the tunnel*", or "movement of the *frames supporting the rock and earth above the tunnel*". (Tr. p. 77, l. 11; p. 71, l. 13; p. 78, l. 8) The report of the railroad's Regional Engineer, dated May 13, 1966, almost immediately after the inspection tour which resulted in the closing of the tunnel, found "longitudinal movement of the *timber tunnel lining*" and "vertical load undoubtedly unevenly distributed causing the failure." (P. Ex. 12) The Assistant Chief Engineer reported that a B&B repair crew noted "other failures in the timber frame sets" in April, and that when Pajari, et al. made their May 12 inspection they "found the report of the B&B Foreman to be correct."

Whether these apparently differing analyses may really be consistent to any extent, we are unable to say. But they certainly cast doubt on the trial court's determination that reasonable minds could not differ on the reason for the closing of the tunnel and that it was "unquestionably . . . caused by



an unusual massive movement of earth and not by negligent maintenance.

Likewise, we are unable to rationalize the seemingly conflicting testimony of Mr. Pajari on the issue of foreseeability. As we have previously noted, he testified -- in response to a question by appellee's counsel which the trial judge held to be objectionable -- that he didn't think the condition could have been anticipated. At other times he testified that the shift of rock -- or whatever it was -- was due to natural forces, was something that must be expected, and that it could be anticipated "except as to location of occurrence." (Tr. p. 98, l. 4-12).

Reduced to its lowest terms, appellee's position seems to be as follows: We had had considerable trouble with the tunnel in the past; various recommendations for its permanent repair had been made, but we had not seen fit to follow them. Repairs were made on a "stop gap" basis, to make it safe for another year or two; such repairs were recognized by us as being merely temporary. We found the tunnel in very bad condition in June, 1964 and had recommended maintenance work in 1964 but had not found it necessary to carry it out, which was obviously a wise decision since the tunnel didn't collapse until 1966. We suffered a cave-in in the tunnel in April, 1966, but this was repaired and the tunnel reopened. It had been recognized for many years that sooner or later it would be necessary either to open-cut the tunnel or to line it with concrete. We had done some planning for the open cut several

years before but little or no progress had been made prior to May of 1966 when we condemned the tunnel. Thus, we had had much trouble with the tunnel in the past and knew we were going to have further trouble in the near future; in fact our temporary repairs held together longer than some of our engineers and maintenance employees expected. However when the tunnel got so bad we had to condemn it, the immediate threat (at least in part) was from the forces of nature and not solely from the deterioration and decay of the structure itself. Therefore our negligence was not a proximate cause of the collapse of the tunnel and we are not liable.

That appellee should have been given the opportunity to try to persuade the jury to accept this defense, we submit, is open to serious question, considering the duties owed to the public by a common carrier and the narrowly limited defenses available to it when it fails to perform its common law and statutory duties. But surely, appellant deserved an opportunity to persuade them to a contrary view.

With evident reluctance, appellee, at the end of this section of its brief (p. 12) makes rather oblique reference to an act of God -- which it had expressly asserted as an affirmative defense. (Rec. p. 28) Appellee argues -- quite properly -- that an act of God may be a defense to a carrier in an action for loss of a shipment or an action for failure to provide cars on request. As our affirmative brief freely recognizes, an act of God may be a defense to an action against the carrier for

any failure on its part to discharge its common law and statutory obligations.

However, these truisms have no applicability to the facts of this case, and appellee makes only a limited effort to contend otherwise. In one of its characteristic generalizations, appellee states that "there is no evidence whatsoever that the movement of earth and rock above the tunnel, resulting in the tunnel's closure, could reasonably have been foreseen or anticipated by the railroad." Appellee forgets, apparently, that the burden is on it to prove that it could not have been foreseen or anticipated. But this statement is glaringly inaccurate anyway. As we have pointed out, even Mr. Pajari's testimony recognized that the shifting of earth and rock -- or whatever it was -- was the result of natural forces and could be anticipated. Indeed, he testified *it must be expected*. (Tr. p. 98)

Moreover, it is not disputed that this "act of God" could have been avoided completely if the railroad had followed the recommendations of its own engineers ten years or more earlier, when the job could have been done without disruption of traffic in and out of Elk River. (Tr. p. 137-138). Even an act of God is no defense to a common carrier if it could have prevented or avoided its consequences by the exercise of the utmost care and diligence. U.S. Express Co. v. Kountze Bros., (1869) 75 US (8 Wall) 342, 19 L ed. 457; New York Central RR Co. v. Lockwood (1873) 84 US (17 Wall) 357, 21 L ed. 627; Bell Lumber Co. v. Bayfield Transfer Ry. Co., (Wis) 172 NW 955.

No act of God was shown by appellee; but if one had been, it would avail the railroad nothing, for the collapse of the tunnel could have been prevented by proper maintenance, or the consequences of collapse avoided by diligent effort directed toward permanent improvements at a time when disruption of freight service could have been minimized if not avoided altogether.

(2) Substitute Service

Appellee hurls its strongest attack against what it describes as repeated allegations by appellant that the railroad was under a duty to truck Johnson's lumber out of Elk River or to pay all or part of the cost thereof. We find no such allegations, repeated or otherwise, in the record or in appellant's brief. We do contend, however: that the railroad owed Mr. Johnson a duty to provide him with the service which it held itself out, by its tariffs, as ready and able to perform; or that, if the providing of such service was truly impossible, the railroad was bound to provide the best alternative or substitute service -- to Mr. Johnson and all shippers in Elk River similarly situated (if any) -- which the circumstances made possible, by the exercise of the high standard of diligence imposed upon common carriers. Precisely what these measures might have been we are not required and have not attempted to say. We only submit that it is abundantly clear from the record that *the appellee did not prove that it was impossible for it to provide any substitute service whatever.*

In response to this argument, appellee pretends to see a solicitation by Mr. Johnson of a discriminatory concession.

Wrapping itself in a heavy cloak of righteous indignation, appellee flails this straw man with great gusto, even up to the point of suggesting that Mr. Johnson is guilty of a misdemeanor by even suggesting such a thing (which, of course, he didn't).

In further justification of its failure to give appellant any assistance or cooperation whatever, appellee cites the sanctity of its tariffs. The railroad, it piously intones, could not possibly provide any truck service or loading equipment or other assistance because its published tariffs did not provide for or require such services. We have no quarrel with this argument. The answer to it is, of course, that the railroad -- faced with an emergency, however caused, which was obviously going to continue for some months and threatened to put at least one of the two or three shippers involved out of business -- should have applied to the Interstate Commerce Commission for an order under 49 U.S.C.A. Section 1(15)-(20), authorizing the suspension of service upon such terms and conditions and with such provisions for alternative service as the Commission deemed necessary in the circumstances.

But the point is that the railroad's published tariff -- which did not provide for any truck service out of Elk River or loading facilities at Bovill -- *did provide for service by rail out of Elk River*. This service -- which was the only service appellant really desired -- the railroad held itself out as providing and was obligated to provide throughout the more than five months that the line was shut down in and out of Elk River. The tariff remained in effect -- never embargoed, never modified,

never suspended, never even discussed with the I.C.C. or the Idaho P.U.C.-- but the railroad simply refused to perform its obligations under it.*

In view of appellee's utter disregard for the obligations imposed by the published tariffs, its protestations that it couldn't possibly lift a finger to assist its Elk River shippers with their desperate transportation problem during the prolonged suspension of service because its tariffs didn't provide for assistance, are little short of ludicrous.

(3) Reinstatement of Service.

Once again (p. 16), as in its Statement of the Case (p. 5-6), appellee recites the three alternatives which were available to it after it had condemned the tunnel, and the *estimated* time required to accomplish each of them. We do not question the railroad's judgment as to choice of method. Nor do we question the estimate that five or six months would be required to do the daylighting job *in the way in which it was done*. We would agree also that the actual construction work could probably be done only during the short Elk River summer, though not the planning, negotiating, etc.

*The railroad seemed to feel that it wasn't necessary to do anything about the tariff, since there were only three or four shippers (outbound). The District Manager of Sales notified the two important customers, and the Bovill station agent, Mr. Holland, told Mr. Johnson orally that they could take no more shipments because the tunnel was condemned. The efficacy of this procedure would seem to be approximately comparable to advising Mr. Johnson by telephone that, without consulting the I.C.C., the railroad had decided to raise his freight rate.



But appellee begs the real questions. These are:

(a) In view of the undisputed fact that the railroad had known for ten or twelve years that this major repair job was necessary, did the railroad meet the high standards of responsibility imposed upon common carriers when it failed to prepare for the work in advance in order to minimize the disruption of freight service?

(b) Having failed to make prior preparations for the daylighting job, was the railroad, as a common carrier, justified in delaying the start of actual repair work while it negotiated with the State to share the cost -- to the shipper's great damage?

If these are fair questions -- and the undisputed evidence in the record establishes that they are -- then each of them demands a negative answer.

Recognizing the need for permanent repairs to the tunnel, the railroad, as early as 1954, made some preliminary investigation of the possibility of a joint venture with the State.

(D. Ex. 15, Tr. p. 86, l. 1) The negotiations broke down after a little preliminary work had been done, and the railroad apparently did nothing further with the project until June 16, 1966 -- two months after the April cave-in and more than a month after the freight service had been suspended. (Tr. p. 86, l. 18) The State had contacted the railroad late in 1965 about reviving the joint venture but nothing was done, except to instruct Pajari to review the matter. As late as June 22nd the railroad had still not made up its mind what to do about the tunnel. The

Assistant Chief Engineer's report of that date was still recommending that "we progress our negotiations with the State." (D. Ex. 15) Bids were solicited on July 22nd and a contract let August 17th.

Even assuming that the railroad was justified in waiting for the roof to fall in before doing anything about the leaks, it is obvious that it could have -- and in the exercise of any sort of reasonable diligence should have -- gotten all the preliminary work out of the way in the ten years prior to April, 1966. Appellee refers (p. 6) to: decisions, negotiations with the State, surveys, purchase of land, preparation of plans and specifications, approval of expenditures, advertising and letting of bids and formalization of contracts -- all of which necessarily preceded the actual commencement of work on the project on August 23rd.

If the railroad had undertaken the obviously necessary repair work before the condition of the tunnel grew so bad that it had to be condemned -- as its own engineers had been recommending for years -- all of this preliminary work at least could have been completed while the trains were still running. Mr. Johnson could have operated through the best part of the operating season and, with proper notice from the railroad, could have prepared in advance for the seven week suspension of operations.

Appellee would contend, of course, that no advance preparation was made because the condemnation of the tunnel resulted from an act of God which it had no reason to anticipate.

As we have seen, the evidence establishes the contrary, but -- even if appellee were right; even if the tunnel had been built and maintained to the highest possible standards, and the Almighty Himself had descended without warning and crushed it in His omnipotent hands -- the railroad would still face the burden of proving that it used every reasonable means to reinstate the service at the earliest possible time. And it can't show this either! Its own witness testified that negotiations with the State was one of two major causes for the delay in starting construction (Tr. p. 101, l. 6-12), and that by so delaying the work until after agreement was reached with the State, the railroad realized a substantial saving. (P. 104, l. 19- p.105, l. 1) *Appellee's gain was Mr. Johnson's loss.*

(4) Damages.

Appellee makes no argument on the issue of damages, but merely refers to the trial court's ruling and remarks on this issue, which we have already discussed in our pre-trial brief (pp. 66-74). We are content to leave it at that.

It cannot be denied that appellee's breach of duty did, in fact, damage Mr. Johnson. The railroad was well aware that its failure to serve was having this effect. There was substantial evidence from which the jury could have determined the approximate amount of such damage. It should have been permitted to do so.



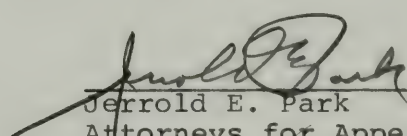
CONCLUSION

The evidence in this case shows numerous breaches by appellee railroad of its common law and statutory duties to accept and carry freight and, generally, to exercise the utmost diligence in the discharge of its position of public trust. The railroad failed to sustain its burden of proving a lawful excuse for its breaches of duty, and should be held liable to appellant for his damages resulting therefrom. But we are not asking this Court, of course, for a determination that appellee is liable to appellant. We only ask the Court to hold that the evidence herein, with all inferences which may reasonably be drawn therefrom, when viewed in the light most favorable to plaintiff, presented one or more material questions of fact upon which reasonable men could honestly differ.

This being the issue, the judgment of involuntary dismissal should be reversed and the case remanded for a new jury trial

Respectfully submitted this 15th day of February, 1968.

McFADDEN & PARK

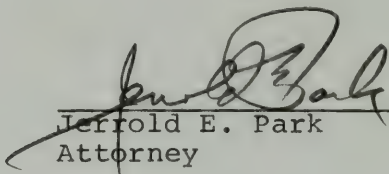

Jerrold E. Park
Attorneys for Appellant
St. Maries, Idaho



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED this 13th day of February, 1968.



Jerrold E. Park
Attorney

McFADDEN & PARK
St. Maries, Idaho
Attorneys for Appellant

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21999 ✓

OREN BELL,)
)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
UNITED STATES OF AMERICA,)
)
Appellant,)
)
v.)
)
OREN BELL,)
)
Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

FILED

JAN 3 1968

WM. B. LUCK CLERK

ROBERT A. PARRISH

536 Fourth Avenue
Fairbanks, Alaska 99701

Phone: 456-4070

Attorney for Appellant
Oren Bell

January, 1968.

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,)
)
Appellant,)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
UNITED STATES OF AMERICA,)
)
Appellant,)
v.)
)
OREN BELL,)
)
Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

I N D E X

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
SPECIFICATION OF ERROR	2
STATEMENT OF FACT.	2
Pre-Traumatic History Summarized.	15
Post-Traumatic Condition Summarized	17
SUMMARY OF ARGUMENT.	20
The Judgment is Contrary to Weight Evidence	20

	<u>Page</u>
ARGUMENT	22
CONCLUSION	37
APPENDIX A	41-50

TABLE OF CASES CITED

Baldwoski v. U. S., 111 F. Supp. 653.	34
Baum v. Murray, 162 P.2d 801 (Wash. 1945)	28
Carminati v. Philadelphia Transportation Co., 176 At.2d 440 (Supreme Court of Penn., Jan. 2, 1962).	32
Croan v..Banner Ohio Transfer Co., 65 N.E. 2d 910 (1943 App.)	28
Descha v. U. S., 186 F.2d 623 (7 C.C.A. 1951)	36
Hatahley v. U. S., 351 U.S. 173, 100 Lawyers Edition 1065 (1956)	35
Imperial Oil, Ltd. v. Drlik, 234 F.2d 4, (6th Cir.), <u>cert. denied</u> , 352 U.S. 941, 1 L.ed. 2d 236 (1956)	35
Indian Towing Co. v. U. S., 76 S.Ct. 122.	36
Link v. Patrick, 367 P.2d 157.	34
Rogge v. Weaver, 368 P.2d 810.	36
Smith v. U.S.A., C.C.A. 9th 1964, 337 F.2d 237	34

United States v. Compania Cubana de Aviacion, S.A., 224 F.2d 811 (1955 C.A. 5th, Fla.)	28
Wilsam v. U. S., 76 F. Supp. 581	28

OTHER AUTHORITIES CITED

Statutes and Rules

28 U.S.C. 1291	2
28 U.S.C. 1346(b), 2671 et seq.	1
Federal Rules of Civil Procedure:	
Rule 52(a)	1
Rule 58	2
Rule 73	2

Secondary Authorities

Cooley's Blackstone, 3 ed, Vol. 2, p. 23	26
Cooley's Blackstone, 3 ed, rev. Vol. 2, pp. 118, 120, 121.	25
Oleck, Damages to Persons and Property:	
Chapt. 1, Sec. 1, p. 1.	28
Chapt. 1, Sec. 2, p. 2.	27
Pope John XXIII, Elcyclical Letter, Pacem in Terris, Peace on Earth - Order Among Men, p. 5.	23
Pound, Jurisprudence:	
Vol. 1, Sec. 24, pp. 430-1.	24
Vol. 3, Chapt. 14, p. 33.	26
Vol. 3, Sec. 100, pp. 330-1	24
Vol. 3, Chapt. 14, Sec. 191, p. 334, et seq.	25
Vol. 4, Sec. 118, p. 56	23

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,)
)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
UNITED STATES OF AMERICA,)
)
Appellant,)
)
v.)
)
OREN BELL,)
)
Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JURISDICTIONAL STATEMENT

This is an action in tort filed against the United States of America under the provisions of 28 U.S.C. Sections 1346(b), 2671 et seq. The District Court for the District of Alaska had jurisdiction of this cause by reason of 28 U.S.C. §1346(b). On January 10, 1967, the District Court for the District of Alaska filed its Memorandum re motion for judgment in favor of defendant United States pursuant to Rule 52(a), Federal Rules of Civil Procedure. On March 24, 1967, the Clerk entered judgment

pursuant to the Court's Findings of Fact and Conclusions of Law and Rule 58, Federal Rules of Civil Procedure.

On April 17, 1967, appellant filed his Notice of Appeal and Bond on Appeal pursuant to Rule 73, Federal Rules of Civil Procedure. Pursuant to Rule 73(g) application was made to this Court for extension of time in which to docket and file the record on appeal. On May 19, 1967, this Court ordered that appellant's time for docketing and filing of record on appeal be extended to and including July 3, 1967. This Court had jurisdiction of this appeal by reason of 28 U.S.C. §1291.

SPECIFICATION OF ERROR

That the Court erred in finding

"9. Plaintiff, from the injuries suffered by him as a proximate result of defendant's negligence, has sustained, with reasonable certainty, the following damages which has been reasonably assessed and computed by the court and are set forth below:"

"b. The sum of \$25,000.00 for past and future pain and suffering."

"d. The sum of \$25,000.00 to compensate plaintiff for the effect of the condition resulting from plaintiff's injuries on his personality, coordination, ability to remember and his disposition."

"e. The sum of \$69,000.00 for impairment and diminution of plaintiff's ability to work and earn money."

upon the grounds that the same are contrary to the uncontradicted evidence in this case.

STATEMENT OF FACT

On the fifth day of January, 1964, Mr. William Burgess was, at approximately 11 o'clock in the morning, operating a

five-ton tractor-trailer approximately 30 feet in length on the Seward Highway south of Anchorage, Alaska (TR 41). At an intersection known as 38th Street, this vehicle turned left (TR 46). At the same time the plaintiff, coming in an opposite direction, attempted to turn right to avoid the tractor's left turn (TR 47). Approximately 17 feet west of the intersection a collision occurred.

The plaintiff was rendered unconscious and was hospitalized at Providence Hospital (TR 418).

Plaintiff sustained a contusion of the left chest, ruptured left diaphragm, ruptured spleen, herniation of the stomach and left transverse colon into the chest cavity and a severe cerebral injury (TR 418). The left lung was partially collapsed because of blood collecting in the chest (TR 419). The spleen was removed (TR 420). The plaintiff was unconscious and remained so thirteen or fourteen days (TR 422). He then began to respond to his name (TR 424). In about sixteen days he was able to comprehend simple commands and be up and walking (TR 424). He suffered other injuries which have since healed and are not the subject of this appeal. He did, however, suffer injury to the urethra which will require dilations for the rest of the young man's life (TR 425).

Dr. Allan Parker, clinical psychologist (TR 435), evaluated the plaintiff's intellectual functions, memory function, and perceptual functions in that it reflected loss relevant to organic brain damage and emotion functioning (TR 437). He found intellectual functioning of the plaintiff to be above average, with variable eye-hand coordination. Intellectually his reasoning remained intact (TR 438). He was deficient in mental control under time pressure and he was deficient in the area of visual reproduction. There was no evidence of brain damage in his perceptual processes and his designs were basically intact (TR 439).

In emotion functioning, however, he was shown to have a tendency toward impulsivity, explosiveness and odd thought processes or ideation.

On a second examination it would be fair to say that he improved some. In most fields (TR 440), however, his personality structure and his character were about the same as in the first with the degree moderated (TR 441). The doctor concluded that the emotion difficulties and emotion controls were permanent and that there would be permanent residual and that there is some possibility that there might be increasing moderation with doubtful full recovery (TR 449).

The doctor concluded after cross examination as follows:

- "Q. Would this degree be reflected actually in his actual ability to hold and retain employment and deal with other human beings?
- A. I previously testified that since employment is connected with interpersonal relationships, these tendencies might make difficulties for him in employment.
- Q. Would that actual degree be reflected in his history of having been able to deal with persons in the community? [emphasis ours]
- A. I believe it would. Normally we consider that history is an important part of such evaluation."
(TR 470)

Dr. Ray Langdon, psychiatrist, examined the patient to ascertain his general demeanor, behavior, attitudes, speech, and to obtain an impression of general emotion responses (TR 472). When first seen, he was bordering on the delusional, was not clearly confused or disoriented but his emotional reaction was hostile and anxious. The doctor was never able to establish a therapeutic relationship with Mr. Bell (TR 475) but based upon the hospital record and the affidavits submitted to him, concluded that the probability was that his controls have been

diminished and that the accident was an important major factor in his condition (TR 477). He likewise concluded (TR 478) that assuming the statements of employers relative to forgetfulness, inability to do mechanical tasks safely, such as jacking a car, in absence of such a history prior to the accident, was related to this trauma (TR 478). Dr. Langdon further testified that destruction of brain cells had to be assumed in this case though not cells of the cerebral cortex (TR 478). The doctor testified that his condition was permanent (TR 480).

Dr. Perry Mead, neurosurgeon, was accepted as an eminently qualified, Board certified, neurosurgeon. He testified that there was no evidence of scalp injury or injury to the skull (TR 495). He identified the injury producing the unconscious state and decerebrate state as being due to the violence of the collision. This witness testified that it was impossible to determine the exact nature of the cerebral injury since the injury here probably concerned the brain stem, one of the mechanisms responsible for the control of behavior, emotion, and consciousness (TR 497). The doctor testified as follows:

"Q. Now, Doctor, just for the purpose of clarifying the testimony you have given, I would like to hand you a rubber model brain and ask you to just show the court what you mean by brain stem and where the hemorrhages are presumed to have occurred and in what centers, and particularly what centers or systems with which you are familiar that control the behavior and control mechanisms of an individual are located in the brain stem, if I am clear on that question.

A. Yes sir. The primary difficulty in a decerebrate comatose individual is in the upper brain stem - I don't have a cross section here - but it would be in the region of the brain stem at this point (indicating), this whole area being brain stem (indicating). Some of the lower brain stem is actually missing on this model. But in the upper

region which is just above the crossing of the major motor pathways where they go from one hemisphere down into the brain stem and cross over and descend into the spinal cord, at this crossing point or just above it is where the influence of the fiber pathways from the surface of the brain have been interfered with, so they develop the comatose state along with the posturing of extremities that are very stiff. The individual straightens out and just stimulating him will make him arch his back and stiffen further.

At this point there are many relay centers to the cerebellar hemispheres which control coordination or prevent tremor, for example, and balance, plus many relays to the surface of the brain and the hemispheres which have to do with a person's emotional responses to their environment, primarily the degree of wakefulness, arousability, alertness and so forth. It's all located in the area just at the point where we have the lesion or injury that produces this comatose state or decerebrate rigidity. It's a diffuse cellular area that runs even further up higher into the brain where correlative pathways to other sections of the brain exist and these include pathways that go up into the brain and also that come from the surface of the brain downward which have to do with a person's response to external stimuli and wakefulness, their emotional responses to their environment, their ability to handle sudden changes in their environment, their ability to handle sudden changes in their environment along with their ability to correlate plans of action, mainly in response to fright or emergency situations.

So I can't show you exactly due to a lack of cross-sections, but it is in the upper brain stem where this condition is known to occur, and the small vessels that go out in there. There is a likelihood that hemorrhages existed due to swelling of the brain and excess pooling of blood in the vessels so the blood eventually gets out into the brain substance and the blood out of the vessels in the brain acts as a foreign body or irritant, and a small hemorrhage in this area is all it needs to produce coma maybe even of a permanent

nature. Fortunately in this individual we know he responded after a time indicating the hemorrhage was not of great severity and at least he did not have any permanent brain damage to the brain stem to the degree of keeping him in a comatose state indefinitely.

Q. Doctor, will you identify, because it will assist us later in argument, the names of the particular systems that you have identified.

A. The diffuse anatomic description of the area involved in the brain stem is called the reticular formation, and there are certain portions of this that have to deal with arousability, wakefulness, correlative pathways to other portions of the brain or higher centers, also relay stations to the nerves that go downward or through the spinal cord, and also a certain amount of control of the nerves that go down into the trunk. In this particular individual the 10th cranial nerve or vagus nerve would be the one possibly influenced by the hemorrhage or abnormalities that occurred in the region of the reticular formation.

Q. What effect would interference with the vagus nerve have?

A. Initially it might allow for stasis or stagnation of bowel function, upper bowel primarily, stomach, to a certain degree the amount of widening or dilation of the bronchi in the lungs, and at a later time excessive impulses over the same nerve would cause stomach ulcers or too much acidity.

MR. VAN HOOMISSEN: We object to the stomach ulcers, Your Honor, on the same basis we have before.

THE COURT: I will sustain the objection.

BY MR. PARRISH:

Q. When you said severe injury to the brain or brain stem was your definition of this in relation to an internal condition?

- A. The injury where decerebrate posturing has occurred in marked depth of coma is a last stage toward what we call failure of the brain stem or modular failure where respiratory activity would cease and then the blood pressure would go up and eventually the patient would die without aid of artificial respiration, and even those given artificial respiration with brain stem failure would not survive more than two or three days in my experience."

The patient was seen to suffer double vision (TR 503), blacking out sensations (TR 503), impairment of judgment of actions with his head turned (TR 504), weakness of the muscle groups of the left hand due to ulnar paralysis.

The doctor performed a transposition of the ulnar nerve which primarily functions to coordinate fine movements, and found weakness of the left hand to be a permanent condition and that the plaintiff-appellant would not be able to operate at peak efficiency with the left hand as with the right hand due to fatigue, cramps, and discomfort with prolonged use (TR 510).

This physician observed the plaintiff over a period of two years. He described him as having a puzzled attitude, seeking repeated explanations, being argumentative, failing to remember each discussion, being worried about his hand, and seeking re-assurance. The physician felt that his headaches affected his behavior and attitude and that he would become frustrated and irritated (TR 512-514). Several medications were attempted for the headaches. None was successful except Mepergan, a narcotic. This narcotic enabled the plaintiff to sleep. He received only a trial of this narcotic, the chief importance being that it indicated to the physician that the headaches were of an organic nature since they were not helped by other ordinary drugs. The physician likewise attempted to control the headaches on an anti-convulsant basis using small doses. It was not advisable

to continue with this course of treatment too maximum efficiency assuming the headaches to be on an epileptic basis since the drug in this case affected the plaintiff's arousal centers preventing normal activity (TR 515-518). Difficulty with treatment was encountered since it was impossible to prevent the headaches without inducing a condition where the patient slept all day.

In 1965 additional drugs and muscle relaxing agencies were used (TR 578). This course of treatment posed better results than others since it was small amounts for the headaches and assisted the plaintiff to remain alert (TR 519), however, his behavior was erratic. He showed up at the office at odd times and did not show up for his appointments.

By April of 1965 he indicated vague paralysis in one arm or one leg varying from side to side. The paralysis was regarded as subjective but was relieved by Edrisal. This being the case, the doctor concluded that there must be dysfunction in the reticular formation previously described (TR 519). The physician noted that, by the last of August, 1965, headaches were persisting, the medication kept the patient going and stimulated him into action, however, tension phenomena and anxiety symptoms were noted (TR 520).

An additional drug, Desoxyn, was undertaken, however, the patient remained depressed although more ambitious. By September 1965 he was again placed on Edrisal (TR 521). By the end of 1965 the patient appeared to be having lots of conflict. There was evidence of difficulty with his attorney; difficulty with his employers and attempting to being employed. Medication was again changed. His headaches were not improved and his initiative and response were not improved so he was returned to Desoxyn. His despondency seemed helped. He appeared to be doing better but by this time he commenced to develop symptoms of

stomach burning (TR 522). Up to the time of trial, he used Edrisal sporadically. Again his ability to reason seems to be affected. The physician testifies that he believes the drug Edrisal helps the plaintiff however as soon as he feels good, he ceases its use.

Dr. Mead then testified as follows: "These headaches are associated with the injury." (TR 524). "They are disabling." (TR 525) "They are permanent." (TR 525).

Assuming that the patient exhibited depression, anxiety, forgetfulness, argumentativeness and frustration, the physician testified that these conditions were related to the injury. The doctor then testified that these problems were related to brain stem injury (TR 527), that they affected his capacity to earn a living, that they are permanent and that these opinions were consistent with his actual observation and treatment of this patient.

The doctor further testified that these conditions could become worse affecting further stomach problems and further emotional difficulties due to continued cellular change, that seizures could develop in the future (TR 530). The doctor further testified that memory difficulties shown by the evidence could relate to the injury and would be permanent (TR 531). Likewise that such memory difficulties would affect the capacity of the plaintiff to earn a living. The doctor likewise believes that the plaintiff should not continue to drive due to his inability to respond to sudden decisions.

An examination of the neuro-surgeon by the Court elicited the following:

"Q. Doctor, I am wondering now, as a result of your examinations and study of this patient what opinion do you have with reasonable certainty as to what effect these residuals will have on this capacity to earn in the future?

- A. It seems to be, as I have observed in this individual, an impeding factor regarding his keeping employment of the type he would ordinarily be expected to perform, and this has been manifested by the various layoffs he has had from different jobs because of poor performance, and some difficulty perhaps in his interpersonal relationships with employers, and lack of them being able necessarily to depend on him. Otherwise, as I have mentioned earlier his employability would be limited to that of tasks that he could perform and still have almost constant supervision. I can't conceive of many jobs available to him that would be of that type, and there again he still has a certain amount of intelligence existing in spite of the injury so he might become frustrated and perform poorly in a job that was very menial, for example, and thereby make it difficult for him to continue with simple tasks.
- Q. In the evidence here by way of oral testimony and affidavits there is testimony to the fact that while in high school he was a photographer for the school paper and yearbook, and took and developed all the pictures and apparently was very proficient in photography. Now was there anything that would interfere with his continuing in that field of endeavor?
- A. It's conceivable that he might have some problems, not so much in the manual requirements, for example, but in the planning and coordinating and if he was working on a commercial basis some difficulties with his employer, or even customers if he tried to be self-employed. He wouldn't be able to perform in certain categories like industrial photography where he might be required to ascend certain heights.
- Q. Are you saying that this man is because of his condition no longer employable in any field of endeavor?
- A. It seems like there should be some field of endeavor for him. I am unable to state just what at the present time. But he has had a trial for a number of jobs since this happened. He's got problems apparently in getting along with other individuals. If

he could get in his own business, for example, or set his own hours and work at his own pace where he would not be frustrated or lead to problems with other people, it's conceivable he could do even photography.

Q. As I understand from Dr. Parker, the psychologist, and perhaps from Dr. Langdon, at least from Dr. Parker, he has an intelligence range in the bright-normal range?

A. Yes sir.

Q. But apparently in this emotional and behavioral field he is abnormal. Now why is that, assuming that an average intelligent person, a normal person, we all realize we can't argue with everyone, we have to do things we don't like to do and we have to get along with our fellow workers. Is there something that has happened to this person as a result of the accident and injury that this individual cannot rationalize and accept and understand that fact and do anything about it? [emphasis ours]

A. That appears to be the case, yes." (TR 551-553)

The testimony of Dr. Terry William Taylor, the only defense witness, a psychiatrist, revealed the following: he examined the plaintiff and had available the uncontradicted evidence in the form of affidavits produced at trial furnished by the plaintiff (TR 563). In addition, the physician took into consideration the psychiatric testing performed under the witness's supervision.

In addition the plaintiff presented to the defense witness the medical records introduced into this trial into evidence (TR 562). In addition the witness was furnished a form of hypothetical question; this likewise being proven in this trial (TR 563). The witness testified substantially as following: that from these records a change in personality was

indicated (TR 563). The injuries of the plaintiff in general terms consisted of severe, gross brain damage from trauma (TR 563). The witness testified the plaintiff suffered severe brain damage at the time of the accident (TR 567). The witness further testified that it is reasonable to say that the plaintiff's present injury is permanent (TR 567). The doctor testified that he is aware that the reticular formation of the brain is related to keeping the brain awake (TR 568). He believed that as a result of this accident this patient had a personality change consistent with brain damage (TR 568). The doctor further testified that the plaintiff's injury would affect his relationship with other people. The doctor then testified that in his opinion the plaintiff would be employable and that he could be employed gainfully. He believes there is a chance that the personality would improve, however, the doctor specifically states that with regard to the possibility that the entire situation, organic brain damage and all the rest of it, could improve or get worse, he stated, "that I really can't say" (TR 574). His testimony in this regard is quoted:

"A. Yes sir, this is the difficulty. If you are referring strictly now to the personality aspect I would think he would improve, but if you are asking me is there any possibility that the organic brain damage may change, I don't really think I can answer that.

Q. Do you have an opinion based on the examination of the plaintiff and the affidavits and so forth, and your experience, to a reasonable medical certainty as to whether or not the plaintiff would benefit by therapeutic or some kind of therapy measures to improve his personality condition, the personality change that exists in the plaintiff.

A. Yes, I do.

- Q. Would you tell us what your opinion is and on what it is based.
- A. My opinion is that he has everything to gain and nothing to lose in attempting to get professional help in learning to deal and live with the damage that he has suffered and to make the best use of those areas that have not been damaged. I base this opinion once again on what I have been taught and what I think is currently being done for all sorts of injuries."

In substance, the witness testified on cross-examination as follows:

- A. That there is a neurological basis for all human behavior (TR 577).
- B. That if the central nervous system is destroyed, the behavior is destroyed (TR 577).
- C. That if areas of the brain are injured and cells destroyed, personality changes result which are permanent (TR 578).
- D. If there is evidence of destructive changes, behavioral changes are likewise probably permanent (TR 578).
- E. The prognosis in these personality disorders is not good (TR 578).
- F. Deep-seated personality disorders caused by organic brain damages are more than likely permanent (TR 579). The doctor points out that past employment as related to employment following trauma is a circumstance which would effect an opinion as to future employability (TR 580). Behavior, coordination, and memory are important in determining if disability exists (TR 581).
- G. That the following evidential factors are important observations in determining this plaintiff's employability:
1. That the plaintiff makes other people afraid of him (TR 583);
 2. That he forgets where he is in time and place (TR 584);

3. That the plaintiff has uncalled-for arguments with customers and employers.

The witness finally testifies that he agrees with the other physicians and that there ought to be something at which this plaintiff is employable, but that he does not know at what it would be.

The uncontradicted evidence shows that this young man, following discharge from the service of the United States, was capable of earning between \$4.20 and \$5.90 per hour as a mechanic and \$4.50 per hour as a beginning truck driver (TR 353); that within nine months preceding his accident, he was able to earn more than \$5,000. His life expectancy was 50 years. There was no reason to believe that he would not have opportunities for advancement.

Pre-Traumatic History Summarized

A summary of the pre-traumatic history of Oren Bell would show that as a boy, Oren Bell was able to do the work of a man.

1. He did manual work (TR 231).
2. He ran a fork lift (TR 231).
3. He was in good physical condition, coordination and mental capacity (TR 232).
4. He was responsible (TR 232).
5. He was trustworthy (TR 232).
6. He worked without supervision (TR 232).
7. He was happy and carefree just like other boys in the neighborhood (TR 237).
8. He was known by those who had known him all his life to be efficient (TR 250).
9. He got along well with customers at the filling station where he worked (TR 250).
10. He was normal for a boy of his age (TR 250-251).

11. Other mechanics felt he was fast and courteous and normal in his work as an attendant (TR 260).
12. He serviced a car properly (TR 260).
13. He was polite and considerate (TR 261).
14. He was cheerful (TR 262).
15. An employer who knew him all his life and for whom he worked approximately three years before his injury employed him to do mechanical work and general work on the service station, waiting upon the general public. He changed tires, made minor electrical repairs, tuned up engines, including carburetors, distributors, and generators, and he "got very competent." He raced cars and tuned up engines for other boys (TR 269-270).
16. Another witness who regularly saw the plaintiff on the job, who saw his work every week in the year before the accident, described him as being a good service station attendant and who had been observed to do good work for other people (TR 281).
17. He was described as observant in what a car should need and things like that (TR 282).
18. He was described as a good, typical boy. He took flying lessons. He was always putting carburetors on his car and "doing things and him and his friends was always going all the time," (TR 290).
19. Mrs. Florette Parker, a mother of 13 children with whose boys the plaintiff had grown up, described him as "a typical kid" who was

"polite," who would do things that her own children would not do. He had a capacity to love others (TR 339-340).

In addition to the above, other witnesses testified generally as to the normality of the plaintiff's personality and activities prior to the time of his injury. This evidence is in all respects uncontradicted.

Post-Traumatic Condition Summarized

While it is difficult to summarize all of the affidavits on file and all of the oral testimony on file relating to the change in Oren Bell, nevertheless, it appears to be uncontradicted that no employer has seen fit to retain Oren Bell in his employment since the accident. These employers make the following statements about his condition since the accident.

1. He had trouble with his equilibrium (TR 234).
2. He would walk along the scaffolding and fall off and go through the roof (TR 234).
3. He couldn't get out of the way of equipment and sometimes slipped. He might put the fork lift up when it should go down, making him a hazard. (TR. 235).
4. He seemed moody (TR 235).
5. He thought his mother's property was his property and ordered workmen to shut down machinery and stop all operations (TR 236).
6. He was discouraged from coming around the neighbors' house because he got too desperate and was worrying the witness's wife (TR 237).
7. He didn't say things that were quite the truth (TR. 243).

8. He would come to the house and say he was going to shut down all equipment and that night he appeared to forget all about it (TR 243).
9. He would go on a wrecker call and never get there. He would be unable to find his way back to the service station (TR 246).
10. In early morning he seemed more normal but when he got a little tired, he would do things this way. He couldn't remember things (TR 246).
11. He would try to change a tire and when it didn't go on, he would hit the tire and rim with his hand to the extent that he was a compensation claim (TR 247).
12. He is a pleasant fellow. He tries to make you figure he is more intelligent than he is and at other times he is more or less a blank (TR 247).
13. He showed poor judgment in driving a truck (TR 252).
14. He could not work the controls of a truck and the accelerator at the same time. He couldn't do two things at one time. He seemed absent minded. He showed a lack of interest (TR 253).
15. He might do it right once and then the next three times he would miss every time (TR 253).
16. He damaged equipment (TR 254).
17. His physical and mental capacity are insufficient to be a truck driver (TR 254).
18. Following his accident, it is difficult to carry on a conversation with him. His memory was off (TR 271-272).

19. It was said following the accident that he did not recognize his former customers (TR 282).
20. He represented himself to be a full-fledged Texaco man and that Texaco said he could come down to his station and put in a little time and catch up with a little Texaco experience (TR 282).
21. He would put the gas nozzle in the tank all right and then get under the hood and you don't know whether he is checking the oil, battery or fan belt, but he is always fiddling around with something else and it takes as long as ten to fifteen minutes for the car to leave there. I had so many complaints I had to let the boy go (TR 283).
22. He has constant headaches (TR 283).
23. He could not coordinate his mind. "He'd say, for instance, 'well, I got to get me a wrench,' and he'd try to pick it up, with the right arm or the left arm" . . . "but he can't pick that wrench up unless he sits with it and concentrates on it . . ." "He got the rest of the employees pretty well irritated, got the customers so mad, disgusted customers even called me at home personally and would say 'Why don't you get rid of this idiot?' " (TR 284).
24. He is the only one who is doing things right according to himself (TR 285-286).
25. On one occasion after fixing a lady's car and making an appointment for her to come back the

following day, he ran her out of the shop when she came back, declaring that she had no appointment with him (TR 286).

26. It was said by an employer that following the accident he was undependable as to where he might place a jack beneath a car and subjected himself to unsafe conditions. The employer felt sorry for him and the boy wanted to work, but he couldn't have him around (TR 292).
27. He used poor judgment in the use of tools, causing them to break (TR 293).
28. When sent to wash parts, he would wander off (TR 293).
29. He couldn't fix a flat (TR 293).
30. He raised cars on the hoist without looking (TR 293).
31. Within the two years preceding the trial, he is usually by himself instead of with others. Sometimes he talks and sometimes he doesn't (TR 294).

Following this testimony, plaintiff's Exhibits F, G, H, I, J, K, L, M, N, O and S were admitted into evidence. We will not review these affidavits, but we commend them to the Court.

SUMMARY OF ARGUMENT

The Judgment is Contrary to Weight Evidence

In summary of argument concerning damages, the plaintiff's first position is that the clear weight of evidence as a matter of law shows the verdict in favor of Oren Bell inadequate. This clear weight of evidence shows:

A. A pre-traumatic state of affairs in the part of the central nervous system related to emotions, behavior, and functional operation of this boy's person was normal.

1. He grew up in the same neighborhood for 10 years as a normal boy.
2. He completed his military service and was honorably discharged a competent soldier, truck driver, and mechanic.
3. He worked as a tune-up mechanic in the nine months following his military service and preceding his injury earning approximately more than \$5,000.
4. His personal relationship with others, ie, employers, his neighbors, and his friends, was a normal relationship.

B. The pathology from which Oren Bell now suffers is that organic brain damage affecting the central nervous system causing:

1. Chronic, persistent, permanent, disabling, post-traumatic headaches.
2. Inability to get along with others in that he is argumentative, nervous, impulsive, and makes others afraid of him.
3. Shows poor judgment and reasoning and memory in that he forgets where he is, becomes frustrated injuring himself, takes chances making him an unsafe employee, is emotionally unstable, loses his way to and from work and does other odd things making him unemployable to the extent that he has been discharged by every employer attempting to employ him.

C. That medical science recognizes that trauma can be the competent producing cause of all of the symptoms and signs and behavioral and emotional disturbances and headaches now suffered and which will in the future be suffered by the plaintiff in this case.

D. That the on-set and progress of the signs and symptoms in this case parallel those cases in which medical science

recognizes the causal relationship between trauma and the disease here suffered and that in all probability the emotional disturbances, diseases, disabilities, headaches, and other functional problems now suffered by this plaintiff will be permanent.

E. That the disabilities here suffered and to be in the future suffered are so disabling that, according to the uncontradicted opinions of all the physicians, there is now no known employment in which this plaintiff, to a reasonable medical probability, may in the future be able to be engaged.

F. The appellate court should review this case de novo and enter findings consistent with the uncontradicted evidence for it is respectfully urged that it would be useless to again refer this case to the trial judge with a request that the appellate court be advised by the trial court as to how and why it, the trial court, was wrong and in error.

ARGUMENT

The judgment of the court finding damages in favor of the plaintiff, Oren Bell, in the sum of \$139,113.65 and against the defendant, United States of America, is erroneous and contrary to law and to the evidence upon the grounds that the same is inadequate.

The right to recover full and complete damages at law is a favored right because it arises out of an absolute right to security of mind and body and is assessed in correction of an absolute wrong.

It is only through recognition and understanding of the law and the judicial process that we may arrive at a correct determination of this given case. There are at least two conflicting interests in every case. The decision must either decide in favor of one of the interests or decide in compromise. There is no other way. In seeking to find the answer in this case we endeavor by this brief to advocate the

full, complete protection of the interests of personal security in health and life and limb. This interest is entitled to be secured to its fullest extent and not in compromise as against the securing or compromise in law of the interest of the wrong-doer.

The first duty of law therefor is to protect this first, most favored right; to consider this case with a view to placing this plaintiff by assessment of damages in the position he would have enjoyed had not this wrong been committed upon his body; to provide appellant with security to replace the means of subsistence of which he has been deprived through no fault of his own.

POPE JOHN XXIII (Encyclical Letter, Pacem in Terris,

Peace on Earth - Order Among Men, p. 5):

"Beginning our discussion of the rights of man, we see that every man has the right to life, to bodily integrity, and to the means which are necessary and suitable for the proper development of life. These means are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services. Therefore, a human being also has the right to security in cases of sickness, inability to work, widowhood, old age, unemployment, or in any other case in which he is deprived of the means of subsistence through no fault of his own."

There is no more ambiguous word in the legal and juristic literature than the word "right." "In its more general sense it means a reasonable expectation involved in civilized life." Roscoe Pound, Jurisprudence, Vol. 4, Sec. 118, p. 56. ". . . or (b) it may mean the interest recognized, delimited with respect to other interests, and secured." Roscoe Pound, Jurisprudence, supra.

"In maturity of law, the legal system seeks to secure individuals in the advantages given them by nature or by their

station in the world and to enable them to use these advantages as freely as is compatible with a like free exercise of their faculties and use of their advantages by others."

Roscoe Pound, Jurisprudence, Vol. 1, Sec. 24, p. 430-1.

"Juristically the change began with the recognition of interests as the ultimate idea behind rights. It began when jurists saw the so-called natural rights are something quite distinct in character from legal rights; that they are claims which men in civilized society may reasonably make, whereas legal rights are means which a politically organized society employs in order to give effect to such claims within certain defined limits. But when natural rights are put in this form, it becomes evident that these individual interests are at most on no higher plane than social interest and indeed, for the most part, get their significance for jurisprudence from a social advantage in giving effect to them." Roscoe Pound, Jurisprudence, supra.

The enforcement of these rights . . . "grows out of the need of equality of operation, predictability, and assured certainty of results under known situations of fact which men feel strongly to be intrinsic in a just order of relations and of conduct. Probably the jurist can do no more than recognize the problem and perceive that it is put to him as a practical one of securing the whole scheme of social interests so far as he may." Roscoe Pound, Jurisprudence, Vol. 3, Sec. 100, pp. 330-331.

"The rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons: . . . And the absolute rights of each individual were defined to be the right of

personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a corresponding nature.

1. "As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health or their reputations."

Cooley's Blackstone, 3 ed. rev., Vol. 2, p. 118, Chicago, Callaghan & Company, 1884. In defining the right of the individual to personal security and his life and limb and body and health, we thus define the wrong or injuries which affect them as absolute wrong. At this time we first pose the question, does the doer of this absolute wrong occupy a place in society or hold an interest which society holds entitled to security.

Thus, it was necessary that a system of law (legal rights) be established to preserve the absolute natural right and interest of the individual to his health, life and limb. We secure these rights in various ways. First, by determining whose interests are to be recognized and secured; and secondly, by the means of redressing an invasion of this security or interest. It goes without saying that redress for the invasion of the interest and security of good health, life and limb where invasion of that right has taken place through negligence is through the establishment, maintenance and preservation of the legal right to recover damages.

Roscoe Pound, Jurisprudence, Vol. 3, Chapt. 15, Sec. 191, p. 334, et seq. (See also Cooley's Blackstone, 3 ed., rev. Vol. 2, pp. 118-120-121) The interest of the wrong-doer is only protected in that the law shields him from assault by the injured or his clan.

Thus, it is the duty of the trial courts to decide cases involving injuries to the persons arising out of negligence in a judicial way for "a court is defined to be a place where justice is judicially administered." Cooley's Blackstone, 3 ed., Vol. 2, p. 23. By this is meant that the court must take that which is before him and, after weighing that which is before him, render judgment. This judgment must be consistent with the evidence and must give effect to the legal rights securing the interest protected by law.

"Inviolability of the physical person is universally put first among the demands made by the individual." Roscoe Pound, Jurisprudence, Vol. 3, Chapt. 14, p. 33.

It is fundamental that having recognized the individual's interest in security of health, life and limb, and having recognized that legal rights to secure that interest must be established, we must necessarily proceed to give a judgment which is not violate of the nature and purposes of that right and interest. For, in plain words: To take a life and give a dollar, to take a limb and give a dime, only pays lip service to the right; degrades the right; makes the right useless; and secures to the wrong-doer a benefit to which he is not entitled under law in our social order.

The right is secured because man's dignity may only be obtained through the use of his mind and body in good health. To invade a healthy mind and body invades the dignity of man. To pay lip service to his right to dignity and to his healthy mind and body through incomplete award invades the right and degrades the right and is degrading to our civilized social order.

We must recognize that judges are men and that their judgments are the result of their knowledge and understanding

and experience. Or, if not that, that their judgments come from learning and understanding and stand as evidence of willingness to give effect to that learning, recognition and understanding in their decisions.

We know that it is always the wrong-doer who cries the loudest. He announces that giving effect to natural rights will put endless work on judges; will raise the taxes of individual men; will increase litigation; and will cause society to become a jungle. While remaining in utmost good health he brands the claimant as a charlatan and a chiseler. He waits in high places with blandishments to prevail upon the judge. Of integrity he has none because he seeks to justify wrong-doing. He seeks to prevail upon the law that it is more important that the innocent shall suffer for the invasion of his peace of mind and body and dignity than it is to assess damages against him the wrong-doer. Although his horn is of tin, it makes much noise.

He condemns the assessment of a large judgment because it is large. Yet law requires a large judgment to compensate a large loss.

Little does the defendant "appear" to value the legal protection afforded him by the payment of money damages. For were it not that society has chosen, in order to avoid civil violence, that he may pay damages to the plaintiff to recompense the wrong, then society must allow the plaintiff an equal assault upon the defendant's body. The wrongdoer would not choose the Hammurabic law of "An eye for an eye". Rather, I suspect the defendant would pay ten times and still enjoy his good bargain. Oleck, Damages to Persons and Property, Chapt. 1, Sec. 2, p. 2, Central Book Company, Inc., 1961.

But if we shall continue to protect the innocent, and secure the right of health, then judgment must recompense the injury, and place the innocent in the same position as he would have been without the wrong; (Oleck, Damages to Persons and Property, Chapt. 1, Sec. 1, p. 1, Central Book Company, Inc., 1961) (Wilscam v. U. S., 76 F. Supp. 581) we must cast aside contentions and false premises which do violence to the preservation of individual dignity.

That the physical person is universally considered inviolable is not a phrase composed of empty words. It is not an empty theory. Under this postulate the law has stood firm for centuries. These words promise to every person that he shall share in the dignity of man. His dignity is not found in a man's power or his possessions. It rests on his right to be treated as a man equal in "opportunity" to all others. It says that he shall share in equal opportunity, educate his family, provide for his own welfare with a healthy body, uninjured through the wrongdoing of another. To deny him compensation is to deny his hopes and his dignity. To apply any other test is to deny him the right to dignity.

In non-jury cases upon appeal to increase the judgment the case should be heard de novo. ^{1/} We recognize that the appellate court has the power in negligence cases to increase inadequate verdicts in a case where the trial judge sits without a jury.

Under these provisions of law the appellant then requests that the Appellate Court consider this case de novo and enter findings and reform the judgment in this case according to the evidence as it will be hereafter discussed.

^{1/} Baum v. Murray, 162 P.2d 801 (Wash. 1945); United States v. Compania Cubana de Aviacion, S.A., 224 F.2d 811 (1955 C.A. 5th, Fla.); Croan v. Banner Ohio Transfer Co., 65 N.E. 2d 910 (1943 App.)

There are several reasons why the method of additur and reformation of the judgment should be adopted by the court in this case, the least of which it has been almost three years from the time of plaintiff's injury to the writing of this brief. None of this fault can be laid to the plaintiff's door. Moreso, because the evidence is devoid of any genuine controversy as to the plaintiff's physical condition or his disabilities and inabilities to perform normal pursuits. As the court will see, we do not contest the facts found by the trial judge insofar as they were found. Our objection is that the trial judge failed to enter adequate findings in some regards, later to be discussed, which do not do justice to the state of the evidence.

At the outset we find that the defendant, United States produced but one witness, Dr. Taylor. That witness received no background evidence from the government. The factual basis upon which he made his decision was furnished by the plaintiff. He was not asked and he did not find at what type of employment the plaintiff might be able to work. He recognized that he did not know at what type of work this might be. He recognized as did all of the other physicians who testified in the case that this boy, while attempting to work, had been discharged by every employer. He recognized and did not dispute that the boy was impulsive, argumentative, strange, forgetful, and suffered pain. He accepted as being consistent with the condition found by him and the organic injury diagnosed by him the testimony of all the witnesses in this case whose evidence appears in the affidavits and transcript here.

It has often been said that damages in personal injury cases are necessarily speculative. This is not true in a case involving organic injury to the brain. Although it is recognized that there is some room for improvement over a

period of time immediately following an injury, that is, two years, it is generally accepted by medical science and all of the doctors here, as indicated in the Statement of Facts, that organic injury to the brain is permanent. Brain cells do not re-generate and that personality changes which can result are permanent (Taylor, TR 578). The prognosis is not good (TR 578-579). It is important in forming an opinion as to future employability that the boy is unable to hold a job (TR 580). Such is important in determining disability (TR 581). This boy's injury was so severe that even a history would not have been necessary to clinically determine that Oren Bell would have difficulty. The factors which have been testified to by all of the witnesses are considered by Dr. Taylor in making his opinion. He concludes that he does not know at what this boy might be employable (TR 585).

This then is the extent of the defense evidence. This is the extent of dispute over Oren Bell's employability. This is the extent to which he will be able to earn a living in the future as testified to by the defense.

The evidence of plaintiff's physicians, and clinical psychologist, all recognize, based upon his history, that he is permanently and organically damaged. The Court, in asking its own questions, laid to rest any inference that this plaintiff had sufficient understanding to be employed. In inquiring, the Court said, "Is there something that has happened to this person as a result of the accident and injury that this individual cannot rationalize and accept and understand that fact and do anything about it?" The witness answered, "That appears to be the case, yes." This witness saw this boy over a period of nearly three years. The witness was accepted by stipulation as an eminently qualified,

Board-certified, neurosurgeon. No statement of fact nor conclusion of the physician was ever attacked upon cross examination. This young man's headaches are admittedly permanent and will render him incapacitated for the next 50 years. This young man's personality has been destroyed and changed and it will, according to the evidence in this case, render him virtually unemployable for the next 50 years. His left hand is damaged and will limit his employability for the next 50 years. His life has changed in that he is lonesome, he no longer has many friends, his former friends are afraid of him, they feel he may become desperate. This condition will exist for the next 50 years, rendering him an unhappy, lonesome person. We again point out that this evidence is undisputed.

It has often been pointed out every verdict must be consistent with the evidence. The opinion of experts must be supported by facts. The witness must not speculate. The verdict should not rest upon passion and prejudice. The assessment of damages for each element of injury should address itself to the evidence and be consistent with the evidence and should, of course, take account of the severity of the injury, the length of time which it will be suffered, and the effect which it will have upon the individual.

Had Oren Bell recovered in one year, counsel for the government would have contended that damage to his arm must therefore be limited to one year and he would have asked the Court to assess an amount of damage consistent with that injury. If we should have assumed in this case, as evidence confirms, that the plaintiff was capable of earning \$9,000 in one year and his injury lasted for one year, then he could not recover except \$9,000.

If the injury had been painful for one year and the pain should have been severe for one month, moderate for three months, and slight for six months, then damages for 30 days of severe pain should be assessed, damages for three months of moderate pain should be assessed, and damages for six months of slight pain be assessed. The government would contend, therefore, that no more could be assessed. Had Oren Bell suffered a personality change for one year, suffering lonesomeness, loss of friends, impulsiveness, aggressiveness, argumentativeness, and was guilty of making false statements to others causing him to be disliked for one year, then, of course, a value must be set upon this damage for a period of one year and no more could be set and the government would have contended that the application of any other rule would be unjust and contrary to law. And, the government would have been correct under that set of facts.

Had Oren Bell suffered medical damages and hospital bills in an amount of \$1,000, the government would have correctly contended that no more could be assessed. Had the government contended that this young man would not be able to pursue his former employment after one year, it would, of course, have been improper to assess damages for any loss of capacity to earn money in the future. Likewise, the government would have been correct in this argument.

BUT SUCH IS NOT THE CASE HERE AND THIS CASE MUST BE BASED UPON THE CASE HERE.

The mental injury or Oren Bell is a permanent injury. It is one which will eventually accompany him to his grave (Carminati v. Philadelphia Transportation Co., 176 At. 2d 440 [Supreme Court of Pennsylvania, January 2, 1962]). The

mental suffering in this case will not be suffered in a blinding flash but in a gray succession of days, months, years and lifetime. The joy of a normal life has been taken away for the next 50 years, more than 18,250 days.

Can anyone believe that the judge was correct when he recognized a destroyed normal life for 18,000 days and that this value was \$119,000.00--about \$6.00 per day. Premorbidly he earned \$22.00 per day at 19 years of age.

Now this plaintiff suffers severe persistent, chronic, permanent, daily headaches which likewise will go with him to his grave. It is not the evidence here that he will be well in one year. The evidence here is he will be free of these headaches when he dies. Oren Bell would ask the appellate court to contemplate this idea of damages for just a moment and review the findings of the trial court in the light of the lifetime of Oren Bell, 18,000 days. We cannot believe that any person should be required to be compensated for a daily headache at the rate of 50 cents per day. Oren Bell would not agree that 50 cents per hour was reasonable for this suffering.

We do not know upon what basis the trial court could have found the value of this chronic, persistent headache, in earning capacity, but we do know that based upon the known facts here, such a verdict is inconsistent with law and reason for whatever reason in fact it was based upon. The trial court had no right, of course, to disregard the uncontradicted evidence.

Likewise, it is not the evidence here that Oren Bell will ever be employable as a mechanic, or truck driver, the way in which he would ordinarily have been expected, under

the evidence in this case, to have occupied his time for the rest of his life. We can see from the evidence that this young man's earning capacity must have been at least and not less than \$10,000 per year. However, we respectfully submit that there would be no way in which the trial court could have found this boy's total loss of earning capacity to have been \$69,000 in the next 50 years under the uncontradicted evidence of this case. He must be made whole in respect to permanent injury based upon earning capacity and life expectancy (Baldowski v. U. S., 111 F. Supp. 653).

While due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses (Thesalonia Smith v. U.S.A., C.C.A. 9th 1964, 337 F.2d 237) the findings of the trial court are not conclusive when the entire evidence convinces the reviewing court that a mistake has been committed (Link v. Patrick, 367 P.2d 157), but the court may not disregard the uncontradicted evidence. His decision must not do violence to that evidence, but must instead give to that evidence the effect which reasonable men would expect and not otherwise.

The plaintiff submitted proposed findings of fact in this case (Appendix A). The United States submitted nothing contrary. The court refused to enter findings consistent with plaintiff's findings. The court's findings do not properly reflect the effect of the evidence in this case.

We, therefore, respectfully contend that credibility of witnesses is not involved. That the facts are undisputed. That the United States in no wise offered evidence contrary to the plaintiff's evidence. That the plaintiff's proposed findings are correct; are consistent with the evidence; are

undisputed; and that the Appellate Court should enter findings consistent with the findings of fact proposed by the plaintiff.

Plaintiff further contends that it would be useless to re-submit such findings to the trial court for comment since the trial court has already refused to comment on the plaintiff's findings. The plaintiff contends that it would be unfair to submit the case for a new trial since the government has already had one full fair trial and an invitation should not be issued to the government to try again to do a little better.

There is no necessity for additional findings in this case as were required in Hatahley v. U.S., 351 U.S. 173, 182, 100 Lawyers Edition 1065, 1074 (1956). The trial court entered particular findings as to particular items of damage much the same as was done in Imperial Oil, Ltd. v. Drlik, 234 F.2d 4, 10 (6th Cir.), cert. denied, 352 U.S. 941, 1 L.ed 2d 236 (1956) and we recognize that damages specifically granted for pain and suffering likewise lie in the sound discretion of the trial court.

However, where the pain and suffering, and the mental suffering, in addition to destroying normal life, have the additional effect of making the plaintiff unemployable, then this unemployability becomes a matter of pure mathematical calculation. It is of no use to return this case to the trial court. The learned judge there could only tell us why he was wrong or how he did not arrive at an adequate judgment in this case.

The plaintiff's memorandum on damages clearly set forth the law of this state and the law of the U. S. in attempting to assist the court in performance of this law

(Descha v. U. S., 186 F.2d 623 [7 C.C.A. 1951]). The appellate court, having the same findings before it, may review the validity of these findings.

Where the evidence is uncontradicted and where the credibility of witnesses is not involved and where the trial court has already failed and refused to make a proper evaluation of plaintiff's damages then the plaintiff contends that he has an absolute right to a new and final determination by an Appellate Court. The plaintiff does not have to prove his case beyond a reasonable doubt but only by the greater weight of evidence. In this case he did prove his case beyond a reasonable doubt. He also proved beyond a reasonable doubt that there is no known work at which he may be employed for the rest of his life. The best that anyone was able to do in behalf of the defense was to speculate that there ought to be something at which he could be employed, but that it is unknown what it might be.

We, therefore, respectfully submit that the court should take the findings of fact of the plaintiff based upon the uncontradicted evidence and enter those findings in behalf of this plaintiff regardless of the amount of the judgment. (Rogge v. Weaver, 368 P.2d 810) It must be remembered that the trial judge should not attempt to be a guardian of the Treasury of the United States (Indian Towing Co. v. U. S., 76 S.Ct. 122).

There is no evidence to support any findings except total permanent disability.

It has always been the law that the opinion of an expert will be received only so far as it is consistent with the basis for that opinion which appears in the evidence.

We recognize that Dr. Taylor would say that he felt Mr. Bell was employable; however, this opinion is not supported by the basis for such an opinion which appear in the evidence of this case. Contrary to his opinion, Dr. Taylor agrees that it is important that a person to be employable must get along with others; Mr. Bell cannot. He must have good coordination; Mr. Bell does not. He should not be argumentative with customers or his employer; Mr. Bell is. That he has been consistently discharged for incompetence; Mr. Bell has. That work history is an important criteria, and is perhaps one of the major factors, in determining whether or not he can adjust to a normal society and is disabled; Mr. Bell is so disabled by headaches. An important observation is whether his history shows a change; Mr. Bell's has. That even without history, Mr. Bell will apparently have difficulty. That the individual makes others afraid of him; Mr. Bell does. That one forgets where he is in time or place or location; Mr. Bell does.

There is, then, no evidence to show in what way this young man might be able at some speculative unknown time in the future be able to make a living.

CONCLUSION

It is then respectfully urged that the appellate court review this case de novo for it is in the same position based upon the uncontradicted evidence that would have appeared had the trial court entered adequate findings of fact.

No matter how long the appellate court may consider the evidence in this case, we know that it will reach the

inescapable conclusion that Oren Bell will never again work at those things at which he would have been normally expected to have been employed had he not been injured.

We know that the appellate court will reach the inescapable conclusion that the term of this disability will be 50 years.

We know that the appellate court can just as easily find an annual loss of earning capacity based upon the evidence here as the trial court.

We know that the appellate court will have the same evidence before it as the trial court.

We know that the appellate court can as easily say that there is now no known employment at which this boy could work as easily as the trial court.

We know that the appellate court has the same evidence of permanent loss of coordination, loss of memory, nerve damage in the left arm, argumentativeness, poor judgment, inability to operate a motor vehicle, impulsiveness, etc., as the trial court. We know that both the trial court and the appellate court are in no better position to judge the employability of this young man than are his employers--Howard Thew, David T. McMahn, Donald Beeson, Robert Yost, Joseph Enriquez, Paul Albright, and Sidney Abbott.

We know that the appellate court will find from the uncontradicted evidence of these employers that this young man is not employable for reasons cited by them which would in fact and have in fact constituted the reasons for his discharge.

It would be unlawful to affirm a finding wherein a plaintiff, capable of earning \$10,000 per year should, when

totally incapacitated, be granted judgment for loss of earning capacity in the sum of approximately \$1400 per year.

We know that the trial court found that between the time of his injury and the date of trial that the trial court assessed lost earnings in the sum of \$14,000. This sum is just a little more than one-fifth of the amount of money which the trial court granted this young man for the next unemployable 50 years of his life. Based upon the evidence here this finding is not and cannot be deemed consistent. There is no evidence that this boy is any more employable now than he has been in the past. The uncontradicted evidence is otherwise.

It is, therefore, respectfully requested that the court make independent findings in accordance with the findings of fact submitted by the plaintiff in Appendix A. It is further specifically requested that the appellate court not send this case back to the trial court for further findings rather than to do so appellant requests that the trial court's judgment be affirmed.

It is an age-old concept that there is no yardstick for pain and suffering other than for the fact finder to consider the nature, extent, and duration of the suffering and without passion or prejudice apply that yardstick to the individual case. Pain and suffering is not sold at the "market place."

But, earning capacity is bought and sold at the "market place." The plaintiff has an "absolute right" to

have the money which he will lose in the next 50 years mathematically calculated according to the evidence produced in this case.

Respectfully submitted,

ROBERT A. PARRISH

536 Fourth Avenue
Fairbanks, Alaska 99701

Phone: 456-4070

Attorney for Appellant
Oren Bell

January, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert A. Parrish
Robert A. Parrish

APPENDIX "A"

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA
 ANCHORAGE, ALASKA

OREN BELL,)	
)	
Plaintiff,)	NO. A-58-64 Civil
)	
vs.)	<u>FINDINGS OF FACT</u>
)	
UNITED STATES OF AMERICA,)	<u>AND</u>
)	<u>CONCLUSIONS OF LAW</u>
Defendant.))	

THIS CAUSE having come on regularly for hearing before the above-entitled court, without a jury, on the 9th day of January, 1967, and having been completed and evidence taken January 16, 1967, and the court having taken said cause under advisement, does now make and enter findings of fact and conclusions of law.

FINDINGS OF FACT

I

This action is brought under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq., and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

II

That the plaintiff is a citizen of the United States of America and a resident of Anchorage, Alaska, and is over the age of 21 years.

III

That William Burgess, an employee of the United States Army District Engineers, with headquarters at

Elmendorf Air Force Base, was, at the time of the incident hereinafter alleged, operating a motor vehicle owned by the defendant, United States of America, with the express consent and permission of the defendant, the United States of America.

IV

That on or about January 5, 1964, the plaintiff, then driving a 1962 Plymouth automobile, was proceeding South on the Seward Highway toward his home near the junction of the Seward Highway and Klatt Road. William Burgess was driving a military truck-tractor, pulling a trailer, and was driving said military truck-tractor pulling said trailer in the performance of his duties as an employee of the United States Army Engineers, an agency of the United States of America.

V

That the vehicle of the defendant, United States of America, was caused to be negligently turned to the left, crossing the center line of the said highway and proceeded approximately 15 to 20 feet beyond the edge of said highway, and did then and there, by the negligence of the United States of America, collide with a certain vehicle being operated by the plaintiff, Oren Bell. That said collision occurred without the negligence or carelessness of the plaintiff, Oren Bell.

That as a direct and proximate result of this collision the court finds the following:

1. The plaintiff, Oren Bell, on the 5th day of January, 1964, was of normal health, normal intelligence, and functionally and physically normal. He grew up as a normal

teen-ager with many friends. He liked mechanics and to work on cars. He liked to race automobiles and was a competent driver, although his record shows that he drove too fast at times. He was engaged to marry a girl with whom he grew up in his neighborhood. He enjoyed a good reputation among the older men and women of his community. He served honorably in the service of the United States. Within a period of 9 months immediately preceding January 5, 1964, he earned in excess of the sum of \$5,000.00. He got along well with the customers who traded at the service station at which he worked. He was a competent mechanic to the extent that he was trained, and had accomplished both major over-haul and tune-up jobs, although, of course, at his age he was not an experienced mechanic. The work he did was well received and he was well-liked by his employer and by the persons who traded at that place of business. He was ambitious and had evidenced an intention to become a pilot and not to be a grease-monkey all of his life. Although an average student, he had more than average intelligence. His record of employment showed that he worked long hours and was fully attentive and interested in everything he did. He was a part of the neighborhood gang of kids who grew up together and who ice-skated and ran together and did things together. His physical capacity was excellent. The court finds that prior to the 5th day of January, 1964, there is no evidence that the plaintiff suffered any loss of memory, stomach trouble, headaches, deficiency in any of his peripheral nerves, and that he was, according to the evidence, physically normal and healthy in every respect. The above is mentioned to indicate the normal

state of affairs in this young man's body prior to his injury on January 5, 1964, as the same is shown by the uncontradicted evidence.

2. That the plaintiff was caused to be hospitalized at Providence Hospital in Anchorage, and that the reasonable cost of such hospitalization was the sum of \$

3. That the plaintiff was caused to spend money to provide doctors' and physicians' services for himself in the reasonable value of the sum of \$

4. That the plaintiff was rendered unconscious and remained in an unconscious and semi-conscious condition for a period of more than 14 days; that he was incontinent of bladder and valve; that he evidenced thrashing about in his hospital bed and was required to be restrained; suffered foot drop, and evidenced a posture of decerebration where his limbs were rigid.

From the foregoing facts, in addition to the professional opinions of all of the physicians who testified in this case, both for the plaintiff and for the defendant, the court finds that the plaintiff is suffering from the residuals of a severe and permanent injury to his brain stem and other diffused areas of the brain. The court finds that the plaintiff cannot at all times orient himself in time and space (Thew, Abbott). He has at times become so frustrated in attempting to perform duties of his employment that he has willfully injured himself (Thew). He has not been able at all times to remember persons with whom he was intimately acquainted (Enriquez). He makes rash statements. (Enriquez, Thew, others). He irritates fellow-workers, and cannot remember (McMahon and others).

He is prone to argue with his employers (Abbott, Enriquez, Thew). He has been discharged on several occasions because he engages in practises dangerous to himself and others, as well as causing damage to his person and property. He performs much of his work in an incompetent manner and with difficulty, and does not seem to be able to understand why he is acting wrongly until after the damage has occurred. He is prone to forget things of which he has been told many times, and wants to do things in his own way. He does not at all times pronounce his words plainly. In conversation he is often known to change the subject to something irrelevant and disconnected with that which is being discussed.

He has never given up a job voluntarily and has been discharged for cause related to the foregoing findings, and because he is dangerous to himself and others, and his inability to get along with fellow-employees and his supervisors.

He is of bright, normal intelligence and menial tasks frustrate him. He wants to do things his way, but exercises bad judgment in doing them and cannot be trusted.

In his dealings with members of the community he is thought to be unpredictable so that it is difficult to tell what he will do next. He makes veiled threats of physical violence which cause others to be uneasy about his true intentions. He is not considered trustworthy for the purpose of baby-sitting with young children, and young children irritate him. Loud noises irritate him, whereas before the accident he freely engaged in all kinds of boisterous activity.

From the foregoing, in addition to much other uncontradicted evidence, the court finds that the plaintiff is, in fact, unemployable.

Based upon the foregoing facts and upon the medical testimony, the court further finds that an actual destruction of brain substance occurred in this plaintiff and that he has suffered a permanent injury to his central nervous system, and particularly the brain stem, and that this injury is the proximate cause of the unemployability of the plaintiff.

The court finds that the injury to the central nervous system of this plaintiff is directly connected with the abnormalities and pathologies from which the plaintiff now suffers, and that these abnormal pathologies were in their onset and progress, directly connected and related to the accident on the 5th day of January, 1964.

The court finds from the medical evidence and all of the other evidence in the case, part of which is heretofore mentioned that the plaintiff has repeatedly attempted to rehabilitate himself in the types of employment with which he was familiar prior to the time of this accident.

The court further finds that because of behavioral difficulties due to his brain stem injury, further training would not make him relatively more employable since he would be unable to get along with people and control his impulses and compulsions and obsessive tendencies, in a normal society.

The court finds that although there is evidence that he might possibly improve, the preponderance of evidence, and especially the medical evidence, is that his condition will remain static for the rest of his life expectancy.

The court finds the life expectancy of the plaintiff to be 50 years.

The court further finds that in addition to the brain injury above mentioned, that as a result of the negligence of the defendant, the plaintiff suffered the following injuries and conditions:

1. The spleen was ruptured and removed.
2. The diaphragm was ruptured and repaired.
3. The plaintiff suffered from a permanent urinary tract condition which will require future treatment.
4. The plaintiff received an injury to the ulnar nerve and now suffers a weakness of the left hand, together with poor coordination of the intrinsic muscles of the left hand, which will likewise cause difficulty in the use of the left hand when engaged in prolonged activities.
5. The plaintiff becomes irritable and nervous; he suffers daily headaches; he has a nervous stomach which may lead to the production of peptic ulcers and which is due to his brain stem injury.
6. The plaintiff suffers poor coordination, dizziness at times, poor memory at times, and has scars which are disfiguring on his arm, stomach and chest.
7. The court finds that the headaches suffered by the plaintiff are of varying severities and are the result of the cranial injury. These headaches become severe at times and as a result of them, the plaintiff may sleep for long periods of time. They extend from each temporal area and across the front of the plaintiff's head. Much medication has been prescribed and used in connection with these headaches. The only effective medication has been found to be a narcotic which is both addicting and has a deleterious effect on the arousal centers of the patient's brain stem which was injured in the accident.

8. The court finds that when compounding together all of these injuries, and particularly the headaches and poor coordination, would render the plaintiff relatively unemployable, even though other injuries heretofore mentioned did not exist.

9. The court finds from the evidence in this case that these facts are uncontradicted and unimpeached, and that the facts above mentioned have been known by the defendant and investigated by the defendant, and that if not investigated, such facts should have been investigated, and must be taken as true.

10. The court further finds that the latter injuries above mentioned are of a permanent nature and are disabling, and were the result of the negligence of the defendant.

11. The court finds that the plaintiff has lost wages, earnings and emoluments, and time, and is damaged in the sum of \$

12. The plaintiff has suffered pain and physical disability and is thereby damaged to the date of this trial in the sum of \$

13. The plaintiff is unemployable at this time; he will remain unemployable in the future. Assuming a life expectancy of this plaintiff to be approximately 50 years, and assuming that the plaintiff would be capable of working at least 8 hours per day for 50 years, 300 days per year, the court finds that the plaintiff would probably in his lifetime engage in gainful pursuits of one type or another, either in regular employment or in his own behalf, of a value of not less than 130,000 hours at the rate of \$6.00 per hour. The court finds that the reasonable value of this

lost time and engagement in gainful pursuits of his own, would represent a total value of \$780,000.00.

14. Taking into consideration that substantial devaluation of the dollar will occur during the next 50 years, and that the purchasing power of the dollar will substantially decrease in the next 50 years, the court finds that this award for lost future earnings should not be reduced to its present worth, and the damages of the plaintiff for loss of time and future earnings for the next 50 years is therefore assessed at the sum of \$780,000.00.

15. The court further finds that based upon a life expectancy of 50 years, the plaintiff will permanently suffer mental anguish, humiliation and embarrassment.

16. Contrary to the pre-traumatic mental and physical state of the plaintiff, the uncontradicted evidence shows that the plaintiff is now a "loner" and no one really wants him. He no longer is a part of his neighborhood gang or acquaintance. He spends most of his time by himself. Whether this be caused by his inability to get along with other people, or his inability to want to get along with other people or be near them because of his incapacities, the court finds to be immaterial. The plaintiff no longer is able to, or wants to bowl, race cars, go to parties, go out regularly with girl friends; he does not have regular close men friends. He is distrusted by members of his community. He is unpredictable, and assuming that the plaintiff shall probably live under these conditions for approximately 18,250 days, and must suffer this disability day-by-day, the court finds the value of such mental suffering to be \$180,250.00.

17. In addition, the uncontradicted evidence shows that this plaintiff suffers daily headaches, and these headaches, according to the medical evidence, are probably permanent and will be suffered for the rest of the plaintiff's life. In addition to the fact that they are disabling, these headaches are painful; these headaches are disturbing; these headaches are the source of fear and anxiety. The court assesses the value of this future physical pain for the next 18,250 days at the sum of \$180,250.00.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the court does now enter its conclusions of law:

1. That the plaintiff is entitled to judgment against the defendant.

2. That damages are assessed in the above-entitled cause in the sum of \$ _____, together with costs to be assessed by the Clerk of this Court, and plaintiff's attorneys' fees to be paid, and from this award shall be assessed according to the statutes in full force and effect on January 1, 1967, in the sum of 25% of the amount heretofore authorized to be recovered.

DATED AT Anchorage, Alaska, this _____ day of _____, 1967.

United States District Judge

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,

)
)
Appellant,)

v.)

UNITED STATES OF AMERICA,

)
)
Appellee.)

UNITED STATES OF AMERICA,

)
)
Appellant,)

v.)

OREN BELL,

)
)
Appellee.)

JUL 3 1968

FILED

JUL 1 1968

WM. B. LUCK, CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT A. PARRISH

536 Fourth Avenue
Fairbanks, Alaska 99701

Phone: 456-4070

Attorney for Appellant
Oren Bell

June, 1968.

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,)
)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
UNITED STATES OF AMERICA,)
)
Appellant,)
)
v.)
)
OREN BELL,)
)
Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

I N D E X

	<u>Page</u>
APPELLANT CONTESTS UNITED STATES' STATEMENT OF FACTS	1
APPLICABLE LAW	5
HOW MUCH CAN THE APPELLANT PROVE?	7

	<u>Page</u>
THE ENTIRE RECORD IS NOT CUMULATIVE.	8
CORRECTION OF FINDINGS	9
THE APPELLANT'S REQUESTED FINDINGS	10
EMPLOYABILITY IS A PRACTICAL CONCEPT	11
EMPLOY THE HANDICAPPED	11
APPELLANT'S POSITION IS SUPPORTED BY EVIDENCE.	13
THE APPELLANT'S MEDICAL CASE IS SUPPORTED BY MEDICAL FACT	15
CONCLUSION	17
SUMMARY.	17

TABLE OF CASES CITED

<u>Beaulieu v. Elliott,</u> 434 P.2d 665, 671 (Alaska 1967).	10
<u>Bullock v. Tamiami Trail Tours, Inc.,</u> 226 F.2d 330	5
<u>Fahs v. Taylor,</u> 239 F.2d 224	5
<u>Frazier v. Alabama Motor Club, Inc.,</u> 349 F.2d 456	6
<u>Indian Towing Co. v. U. S.,</u> 76 S. Ct. 122.	14
<u>Orris v. Higgins,</u> 180 F.2d 657	5,6

Page

<u>Patrick v. Sedwick,</u> 413 P.2d 169	10
<u>Surasky v. U. S.,</u> 325 F.2d 191	6
<u>Wilson v. Interior Airways, Inc.,</u> 384 P.2d 956	17

OTHER AUTHORITIES CITED

<u>The Neural Basis of Human Behavior, Saxton</u>	15
---	----

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,)
)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
)
UNITED STATES OF AMERICA,)
)
Appellant,)
)
v.)
)
OREN BELL,)
)
Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

APPELLANT CONTESTS UNITED STATES'
STATEMENT OF FACTS.

The United States in its brief is inaccurate in that the statement of facts supplied by the United States violates the rules relating to the preparation of statements of fact.

1. The Appellee includes argument within the statement of fact. Example: page 7 at bottom, ". . . and I feel that a

fair interpretation of the evidence of all the doctors would support Dr. Parker's analysis." Example: page 7 middle, "This fact was also verified by Dr. J. Ray Langdon, the psychiatrist, who examined appellant on appellant's brief." Further examples appear at the bottom of page 5 and the top of page 6.

2. The Appellee misquotes the evidence of witnesses. Example: page 5, ". . . and that in fact he was injured to a mild extent but he had plenty of resources left (TR 468, line 21)" a true reading of the transcript at page 468:

"A I did. There was a hooker in it. About the emotional stability. I do not believe that he has plenty of resources left. I believe I stated in my report that he needed help in this area, as much as it was possible to give him. I did think that his emotional capacity was intact and that there was a lot of that to use if he could use it.

Q I misstated you, Doctor, your actual statement was, 'While he has been impaired to a mild extent by his injuries, at the same time there is plenty of capacity left provided he can deal with his emotions sufficiently well to allow it to develop.'

A Yes sir." (TR 468)

What the doctor is trying to say here is that the plaintiff-Appellant must be able to use his emotional capacity which he cannot.

3. This brings us to the third objection to the statement of fact taken out of the context of the witness's testimony. Immediately following page 470, the above quoted statement, the doctor testified:

"A The tests reflect that there was some impairment of memory and there is a lack of controls, impulsivity, explosiveness and some bizarre ideation.

Q Would this degree be reflected actually in his actual ability to hold and retain employment and deal with other human beings?

A I previously testified that since employment is connected with interpersonal relationships, these tendencies might make difficulties for him in employment.

Q Would that actual degree be reflected in his history of employment and history of having been able to deal with persons in the community?

A I believe it would. Normally we consider that history is an important part of such evaluation.

(There were no further questions and the witness was then excused. Court was briefly in recess) (TR 469, 470)

Appellant's brief states that Dr. Parker stated whether the injuries would be permanent or not would be speculative (TR 445, line 21). The entire context of the doctor's statement is contained in the record, page 445 through 446, beginning with "It is my opinion that there will be some residual . . . Plus one other thing, Your Honor, also. It is a matter of training and clinical experience, that the brain, except for certain sorts of activities, does not repair itself." And further, on page 447, "Again this comes out of knowledge and clinical experience that many areas of the brain do not have the capacity for regeneration and when nerve cells are destroyed they do not replace themselves. Whatever function

is regained is in a large measure due to the finding of new pathways and the use of areas which were undamaged originally, but there are in all likelihood areas remaining which are filled with tissue which is non-functioning on a neuro basis. It is space filled with material and it's non-functioning."

4. With these objections in mind, we then proceed to the fourth objection which is that the testimony of experts is judged according to the validity of opinion based upon facts as a whole. The government cites page 438, line 22, as reading: "That his reasoning ability remained intact." The exact statement was, "His reasoning ability seemed to remain intact. This was in the area of intellectual performance. Therefore, I felt his intellectual performance had not been severely or probably even mildly impaired by what happened to him." Certainly, the government was misled by the doctor's statement. This failure to quote the entire thought of the witness is a statement out of context which does not convey the complete thought. The government cites transcript of record 442, line 11, as follows: "He was also of the opinion that many of the emotional tendencies which appellant demonstrated subsequent to the accident had pre-existed it." The witness in fact stated, "Yes sir, with the understanding that it is a hypothetical question. My reason for caution on this is, as I stated before, I had not examined or had no baseline of knowledge to proceed from with this young man. I deduced that some of the tendencies, particularly in the emotional area had pre-existed. However, it is the nature of the kind of organic brain damage which was evident from the medical records that controls would be loosened further, would be less available to him under emotional stress subsequent to

the trauma than previous to it."

Although without citation, Appellee insists that Dr. Langdon felt that therapy would definitely help Appellant's condition. We have not discovered such a statement attributable to Dr. Langdon.

APPLICABLE LAW

Rule 52 (b) announces the general rules that findings of fact will not be set aside on appeal unless clearly "erroneous."

But courts of appeal are not bound by Rule 52 (b) in all cases.

Where there is no contradiction of fact, the correct rule is set out in Fahs v. Taylor, 239 F.2d 224:

"(1) We have repeatedly held that where there is no dispute as to the basic evidentiary facts, (and there is none here) and nothing remains but for the trial court to apply the process of reasoning to achieve a correct interpretation of the legal significance of evidentiary facts, as such conclusion of the trial court reaches an 'ultimate fact', is subject to review, not as we review a finding of fact, but freed from the restraint of the 'clearly erroneous' rule. The clearest statement of this principle is contained in Galena Oaks Corp. v. Schofield, 5th Cir., 218 F.2d 217, 219; it was reiterated in Goldberg v. C.I.R., 5th Cir., 228 F.2d 709 and most recently applied in Consolidated Naval Stores Co. v. Fahs, 5th Cir., 227 F.2d 923."

In 226 F.2d 330, Bullock v. Tamiami Trail Tours, Inc., Orris v. Higgins, 180 F.2d 657:

"The court reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here the court felt the District Court had only to apply legal reasoning to facts.

Here the court set out testimony.

Where there was no credibility issue:

"... absent credibility issue the reviewing court was in as good a position as the trial court to evaluate testimony, draw inference of which testimony was reasonably susceptible and decide critical issues raised and the 'clearly erroneous' rule was inapplicable to findings based solely on undisputed testimony contained in the deposition of witnesses whose credibility was unchallenged." Frazier v. Alabama Motor Club, Inc., 349 F.2d 456.

Where the court finds no substantial dispute and much evidence is undisputed, the court is Surasky v. U. S., 325 F.2d 191 held:

"The facts are not in dispute since substantially all of the facts were either stipulated between the parties or proven by undisputed affidavit, or by deposition which was not in any way countered."

Likewise, upon review of the entire record, the reviewing court may find differently than the trial judge:

"Even though there is evidence to support it the case may be reviewed if the reviewing court is left with the definite and firm conviction that a mistake has been committed reviewing the entire evidence."

"Evidence sufficient to support a jury verdict may not be sufficient to support a trial judge."

"Virtually irresistible inference drawn from undisputed facts. [emphasis ours] Orris v. Higgins, 180 F.2d 537.

In summary then, we see that the appellate courts have seen the way to correct those "conclusions" of the trial judge in those cases where the reviewing court can discern from the record, devoid of substantial dispute, that an error in the judgment has been made.

In this case we find that many undisputed affidavits were filed. (TR 356-7). Not only were these affidavits not disputed, but the record shows them to have been previously presented to the government. Counsel's affirmative statement appears in the record (TR 357-8) that the government was unable to dispute these affidavits. This presumes that the government investigated their truth.

The court should, therefore, review the entire record free from the "clearly erroneous" rule. The trial judge's findings are, however, "clearly erroneous."

HOW MUCH CAN THE APPELLANT PROVE?

By the presentation of witnesses, the Appellant established in undisputed fashion the normal state of affairs in Oren Bell's body and mind prior to trauma.

The undisputed evidence by Appellant established the pathology from which Oren Bell now suffers as being the result of injury to the brain stem. It is this neural injury which is the basis of the emotional imbalance which has resulted in Appellant's discharge from every job by every employer with whom he has sought to be employed. The system of cells located in the brain stem known as the reticular system were destroyed. The operation of these cells was normal and unaffected prior to trauma as shown by the normal state of affairs in this boy's body prior to trauma.

It is undisputed that the reticular system may be effected by trauma.

It is admitted that the onset and progress of Appellant's system is consistent with and parallels those cases wherein medical science recognizes a causal relationship to trauma. It is admitted that when brain cells are destroyed (organic destruction occurs), these cells do not regenerate and after two years results must be regarded as permanent.

This is all that the Appellant can prove.

THE ENTIRE RECORD IS NOT CUMULATIVE.

The Appellant respectfully refers to the entire record in support of his case.

The duty of reviewing the entire record is burdensome and cannot be encompassed in a brief.

The feeling and understanding of women, themselves mothers, who successfully reared families, is plain in their forthright consideration of this boy's problem. (Parker TR 317-322, and Moore TR 337-348)

There is no witness cumulative in this case. The observations here testified to relate themselves to the change which took place in Appellant as a whole person.

The government may then not object that Appellant's proof did not show enough of this boy's life to sustain the fourth step of Appellant's proof, to-wit: that the onset and progress of this condition parallels and is consistent with those cases in which medical science recognizes the relationship of trauma to the condition or disease.

Each day, each act; each impression is relevant. Brain injury is not suffered in the performance of a single

duty, or in a blinding flash of pain or discomfort. Instead it remains as a scar upon life through a gray and lonesome succession of days, months and years. Its effects traverse the whole spectrum of one's existence. It is felt day and night through the pity; the avoidance; and the reluctance of acceptance of those with whom he was formerly close.

In his over assurance, his lies, his representations that he is someone who he is not, does our Appellant know of his defect? Obviously not or he would not have allowed himself to change. No one can believe that there is a substitute for happiness. No one can believe that money is an adequate substitute. Oren Bell would trade all of the judgment ten times to be restored to himself and thank God for the bargain.

The evidence is not cumulative; instead it affords a full cross section of Oren Bell's pre-traumatic and post-traumatic life. This cross-section is essential to a medical determination that the onset and progress of this condition parallels and is consistent with those cases in which medical science recognizes the relationship of trauma to the condition or disease.

CORRECTION OF FINDINGS.

The court did not base the verdict upon the statement of fact cited by the government. First, because the statement by the government is not a correct statement; secondly, if that had been a correct statement of the evidence it would still have been erroneous in that it was out of context and contrary to the conclusions of those medical witnesses who testified.

The court chose not to make specific findings either as to loss of annual earning capacity (Patrick v. Sedwick, 413 P.2d 169) or reduction to present worth (Beaulieu v. Elliott, 434 P.2d 665, 671 [Alaska 1967]), or any finding at all as to the employability of Appellant.

Appellant requests the Appellate Court to instruct the trial court to enter a verdict in accordance with paragraph 13 of the findings of fact submitted by Appellant appearing on page 48 of Appellant's brief.

THE APPELLANT'S REQUESTED FINDINGS.

The Appellant should submit findings to assist the trial judge but there is no duty under Rule 52 (b) to ask the court to review findings where correct findings have already been submitted. The government cites no authority.

Under the clear weight of evidence here, we respectfully submit that the court had no choice between two permissive views as the government suggests.

The government points to no evidence sustaining the employability of Appellant. If Appellant is employable we respectfully inquire: AT WHAT? Certainly no one knows and we cannot speculate.

The entire record shows this Appellant would work if he could get a job.

Weight of evidence does not mean that the government can grasp a straw of evidence from a haystack of evidence and contend that the straw outweighs the remainder of the stock. It clearly does not do so.

The government offered no proposed findings of fact.

EMPLOYABILITY IS A PRACTICAL CONCEPT.

One is not required to be a vegetable to be unemployable.

Nor is one required to lose two eyes, two arms, or two legs to be unemployable.

The test is: Does the evidence by its greater weight show that there is any known occupation at which this young man is, to a reasonable probability, employable.

A. Dr. Taylor knows of none.

B. Dr. Mead knows of none.

C. None of Oren Bell's employers believe so.

These employers are the real experts endowed by our system with the duty of total, final, judgments in these matters.

The established fact here is that this boy has not been able, though he has often tried, to hold a position of employment. He has been a loss to the Nation that he honorably served--he is no longer trusted in his community--he is without friends--he is shunted from pillar to post. We cannot escape these facts--We cannot avoid them by branding them as unsupported or speculative. There is in fact no known employment at which this young man will be able to function from now until the time that he shall be placed in his grave.

EMPLOY THE HANDICAPPED.

It is interesting to hear, on National television hookup, Mr. MacDonald Carey, a well-known screen star, speaking for the United States government, state: "Many of the handicapped are employable."

We agree: Oren Bell has been employed since his accident. He has been discharged from each and every job for reasons each assignable to his injury. He had worked from the time he was a child. He had never been discharged before.

But although many of the handicapped are employable, Oren Bell is not employable. He is not one of the many who are employable.

We have said before that the "proof is in the pudding." His employers have repeatedly disagreed with the conclusions of the trial judge.

It is the judge who is bound by the decision of the employers, not the employers who are bound by the decision of the judge. We must remember that the United States does not, by evidence, dispute the findings of the employers. Therefore, the court is bound by the uncontradicted evidence.

Respectfully, we argue that one who is injured through no fault of his own, through the fault of the United States, is entitled to damages commensurate with his productive power as it existed before trauma.

The fact of handicap is here fully admitted by Dr. Taylor.

The fact that employment has been attempted in good faith is admitted.

The fact of unemployability has, in fact, as well as theory been fully established. We cannot in deference to mistake and error or to punish Oren Bell for any reason, ignore the clear and beneficent purposes of the Federal Tort Claims Act which is fully applicable here.

Had we been dealing in an era, or at a time when the neural deficiencies and disability of the mind and substance of the brain were not fully explainable by competent evidence, our plea here might be questionable.

All we ask is that the law recognize the neural basis for human behavior as the same has been recognized by medicine, and that when that behavior is so altered, through the advent of trauma and fault of another, and a human being is made unemployable, that then this injury shall receive the same recognition in law as a handicap in the function of any other part of the human body.

The mere fact that an injury is not observable by x-ray does not mean that there is no injury.

On the contrary, Dr. Langdon did state, "We were never able to establish a therapeutic relationship even though he stated he wanted treatment . . ." On page 479, lines 11, 12 and 13, Dr. Langdon stated, "To the extent that there is any structural brain cell damage, there is nothing we can do about that."

APPELLANT'S POSITION IS SUPPORTED BY EVIDENCE.

The Appellee states: "Mere speculation that they (findings of fact) are in fact erroneous does not sustain this burden, nor does a lip service attack on the trial judge and the United States attorney sustain the burden, nor does the fact that Mr. Parrish feels that the judgment is inadequate sustain the burden."

The Appellant has seen fit to cite those principles of law which direct the Appellate Court's attention to the source of error.

The Appellant has never criticized the findings of the trial court so far as they go. The problem was and has been that these findings have never directed themselves to the true criteria of damages here.

This Appellate Court will remember that there are, in TORT cases two diametrically opposed philosophies which militate against each other. On one hand the plaintiff pleads in these cases that his personal security be restored in damages. On the other, the defendant seeks to guard his property from invasion by the claim of the plaintiff.

It must be recognized that individuals, be they attorneys or judges, may, by reason of background or legal environment or nature, be either unable or unwilling to recognize the effect of evidence in an individual case, for fear that, in the decision, or advocacy, a trend might be created which would encourage an onslaught against the citadel in which their mind resides.

It was, therefore, in recognition of these unspoken sources of injustice that Justice Frankfurter spoke when he cautioned the judges of United States courts that courts had no duty as guardians of the treasury of the United States (Indian Towing Co. v. U. S., 76 S.Ct. 122).

The Appellant must then respectfully submit to the Appellee United States of America that this case is submitted to the Appellate Court as one of those cases wherein the trial court was correct insofar as it went but did not give effect to the combined evidence and diagnosis of the total injury which occurred here, particularly the injury in the emotional controls of the human being which in their neural

basis are centered in the reticular system of the human brain stem.

THE APPELLANT'S MEDICAL CASE
IS SUPPORTED BY MEDICAL FACT.

Reference is made in the government's brief to medical speculation. Nothing could be further from the facts. This case is supported by the contemporary knowledge of medical science which acknowledges the existence of the neural basis of Appellant's irrational conduct as being related to injury to the reticular form of the brain stem.

This medical fact, undisputed here, was not manufactured through speculation of this counsel for purpose of fraudulently obtaining money from the United States. It was discovered through the efforts of medical science in its quest to eliminate human suffering.

The horribly sad and terrifying fact is, that a normal, productive, ambitious, gregarious, trustworthy young man, living in dignity, was changed, through injury to his brain stem, into a nonproductive, lonesome, frustrated, argumentative, untrustworthy individual living alone and without dignity.

In the contemporary sophistication of modern medical science we have become aware that "There is a neural basis for all human behavior." (The Neural Basis of Human Behavior, Harold Saxton Burr, Ph.D., Charles C. Thomas, Publisher, Springfield, Illinois) A human being who suffers hallucinations will not be burned as a witch. It is common knowledge that such conditions may exist or be precipitated with or without the advent of trauma.

The exact issue of fact to be determined in this case is whether or not the emotional controls of Oren Bell are so affected by this trauma that he is not employable. (This in addition to other partial conditions). This issue of fact has never been faced by the trial judge nor the government in its brief.

We must allow recovery to an injured person upon the basis of abnormality produced by the accident. He does not claim error for failure of the trial judge to recognize other injuries not producing such disability. But the government and the trial judge do not pretend to recognize the real issue in this case.

The pathology from which plaintiff suffers has made him unemployable.

"Q As I understand from Dr. Parker, the psychologist, and perhaps from Dr. Langdon, at least from Dr. Parker, he has an intelligence range in the bright-normal range?

A Yes sir.

Q But apparently in this emotional and behavioral field he is abnormal. Now why is that, assuming that an average intelligent person, a normal person, we all realize we can't argue with everyone, we have to do things we don't like to do and we have to get along with our fellow workers. Is there something that has happened to this person as a result of the accident and injury that this individual cannot rationalize and accept and understand that fact and do anything about it? (emphasis ours)

A That appears to be the case, yes." (TR 553)

CONCLUSION.

The court is bound by expert medical knowledge in those areas of the case which require the production of expert medical testimony.

The general rule is that the Appellant, to sustain the burden of proof in respect to the medical aspects of his case, must produce medical evidence to do so.

But a corollary to the rule is that the finders of fact may not ignore the uncontradicted medical evidence.

All medical evidence points to severe organic impairment--anxiety--paranoia--frustration--personality change--headache--poor judgment--lack of control--poor physical coordination--memory defects.

The trial judge was bound to accept these residuals of the trauma.

That these and others have resulted in unemployability is proven. (Wilson v. Interior Airways, Inc., 384 P.2d 956).

SUMMARY.

In this reply brief we are calling attention to the matter of employability as it has been raised in the government's brief which has been connected with the principle central nervous system difficulties encompassing impulsivity, emotion, liability and lack of emotional control. We must not forget that other cumulative factors pointed out in Appellant's original brief which include both coordination, poor balance, headaches and other specific memory and mental difficulties, all cumulate in addition to those things specifically discussed here in the reply brief.

Dated at Fairbanks, Alaska, this _____ day of _____,
1968.

Respectfully submitted,

ROBERT A. PARRISH
536 Fourth Avenue
Fairbanks, Alaska 99701
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert A. Parrish

No. 22000 ✓

In the
United States Court of Appeals
For the Ninth Circuit

FRUIT INDUSTRIES RESEARCH FOUNDATION, d/b/a
FOOD INDUSTRIES RESEARCH & ENGINEERING,
Appellant

vs.

THE NATIONAL CASH REGISTER COMPANY,
Appellee

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

ELWOOD HUTCHESON
Attorney for Appellant

314 Miller Building
Yakima, Washington

FRANKLIN PRESS  YAKIMA, WASH.

FILED

SEP 22 1967

WM. B. LUCK, CLERK

INDEX

	<i>Page</i>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
SPECIFICATION OF ERRORS	11
SUMMARY OF ARGUMENT	12
ARGUMENT	13
1. Applicable General Legal Principles	13
2. Actionable Misrepresentations as to Adequacy for Service Bureau Work	14
3. Actionable Misrepresentations as to Future Patronage	33
CONCLUSION	39

TABLE OF CASES

Anderson Feed & Produce Co. v. Moore, 66 Wn. 2d 273, 401 P. 2d 964	14
Bland v. Mentor, 63 Wn. 2d 150, 385 P. 2d 727 ..	30
Brown v. Underwriter at Lloyds, 53 Wn. 2d 142, 332 P. 2d 228	32
Byrnes v. Mutual Life Insurance Co., (9 Cir.) 217 F. 2d 497	26, 32
Cosen v. Roehl, 63 Wn. 2d 384, 387 P. 2d 541 ..	28
Equitable Life & Casualty Insurance Co. v. Lee, (9 Cir.) 310 F. 2d 263	38
Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed 1188	13
Federal Finance Co. v. Cass, (Neb.) 235 N.W. 579 ..	38
Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490 ..	24, 25
Fossum v. Timber Structures, Inc., 54 Wn. 2d 317, 341 P. 2d 157	29
Gaines v. Jordan, 64 Wn. 2d 661, 393 P. 2d 629 ..	32
Hall v. Puget Sound Dredge & Dry Dock Co., 66 Wn. 2d 442, 403 P. 2d 41	14
Hartwell Corp. v. Bumb, (9 Cir.) 345 F. 2d 453, cert. den., 382 U.S. 89	32
Hirsch v. Archer, (2 Cir.) 258 F. 2d 44	38

Hobson v. Union Oil Co., 187 Wash. 1, 59 P. 2d 929	32, 35
Holcomb & Hoke Mfg. Co. v. Auto Interurban Co., 140 Wash. 581, 250 Pac. 34	27, 32
Holland Furnace Co. v. Korth, 43 Wn. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166	15, 27
Howard v. Howe, (7 Cir.) 61 F. 2d 577, cert. den., 289 U.S. 731	38
Hurst v. Washington Cannery Co-op, 50 Wn. 2d 729, 314 P. 2d 651	14
Jacquot v. Farmers Straw Gas Producer Co., 140 Wash. 482, 249 Pac. 984	31, 35
Jenness v. Moses Lake Development Co., 39 Wn. 2d 151, 234 P. 2d 865	23
Kausky v. Kosten, 27 Wn. 2d 721, 179 P. 2d 950 ..	38
Kritzer v. Moffat, 136 Wash. 410, 240 Pac. 355, 44 A.L.R. 681	36
Lambach v. Lundberg, 177 Wash. 568, 33 P. 2d 105	32
McInnis & Co. v. Western Tractor & Equipment Co., 63 Wn. 2d 652, 388 P. 2d 562; and 67 Wn. 2d 965, 410 P. 2d 908	32
Marr v. Cook, 51 Wn. 2d 338, 318 P. 2d 613	32
Messina v. Rhodes Co., 67 Wn. 2d 19, 406 P. 2d 312	13
Miraldi v. Wick, 117 Wash. 207, 200 Pac. 1094 ..	19, 23
Murdoch v. Leonard, 1 Wn. 2d 37, 95 P. 2d 37	38
Nyquist v. Foster, 44 Wn. 2d 465, 268 P. 2d 442 ..	32
Petersen v. Graham, 7 Wn. 2d 464, 110 P. 2d 149 ..	32
Peterson v. Hicks, 43 Wash. 412, 86 Pac. 634	38
Philadelphia Storage Battery Co. v. Kelley, (8 Cir.) 64 F. 2d 834, cert. den., 290 U.S. 651 ..	38
Rummer v. Throop, 38 Wn. 2d 624, 231 P. 2d 313 ..	20
Scroggin v. Worthy, 51 Wn. 2d 119, 316 P. 2d 480	25

Seaboard Terminal & Refrigeration Co. v. Droste, (2 Cir.) 80 F. 2d 95, 96	38
Shepard v. Cal-Nine Farms, (9 Cir.) 252 F. 2d 884	32
Swanson v. Solomon, 50 Wn. 2d 825, 314 P. 2d 655	15
Trudeau v. Haubrick, 65 Wn. 2d 286, 396 P. 2d 805	14, 31
Walla Walla Port District v. Palmberg, (9 Cir.) 280 F. 2d 237	13
Weller v. Advance-Rumely Thresher Co., 160 Wash. 510, 295 Pac. 482	27, 32
Woods-Faulkner & Co. v. Michelson, (8 Cir.) 63 F. 2d 569	38

OTHER CITATIONS

51 A.L.R. 46 Annot.	27
23 Am. Jur. 789, sec. 32	38
37 C.J.S. 231, 237, sec. 11, 12	38
28 U.S.C. 1291	2
28 U.S.C. 1332 and 1441	2

United States Court of Appeals
For the Ninth Circuit
No. 22000

FRUIT INDUSTRIES RESEARCH FOUNDATION, d/b/a
FOOD INDUSTRIES RESEARCH & ENGINEERING,
Appellant

vs.

THE NATIONAL CASH REGISTER COMPANY,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This action was commenced in the Superior Court of Yakima County, Washington, where the plaintiff's principal place of business and the defendant's branch office were situated, and was removed on petition of the defendant. As appears from the complaint, petition for removal, and the pretrial conference order the District Court had jurisdiction because of diversity of citizenship, the plaintiff being a Washington corporation, the defendant, a Maryland corporation (with its principal place of business at Dayton, Ohio), and there being the requisite amount in controversy (Tr. 1-9, 36, 37. (Tr. herein refers to the clerk's transcript of rec-

ord, and R. refers to the court reporter's record of trial proceedings.) 28 U.S.C. 1332 and 1441.

This appeal is by the plaintiff from a final decision and judgment dismissing the action entered by the District Court, and this Court therefore has its customary appellate jurisdiction to review the same. (Tr. 72, 79). 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action at law to recover damages in the sum of \$150,000.00 brought by the purchaser against the seller of certain very expensive electronic computer data processing equipment, referred to as an NCR 390 console and central processor machine and its accessories.

The basis of the action is actual or constructive fraudulent misrepresentations by the defendant through its sales representative, Chester K. Rasmussen, at Yakima, Washington, which were relied upon by the plaintiff and induced the plaintiff to purchase this equipment, namely (A) that this equipment was in all respects suitable, appropriate and adequate for successful profitable service bureau data processing and computer work; and (B) that the defendant promised and agreed to procure and provide at its own expense sufficient patronage and customers for the plaintiff so that the plaintiff could operate a commercially successful profitable data processing service bureau business at Yakima without any sales staff work by

the plaintiff; and that said promises, agreements and statements were made by the defendant with the fraudulent intention not to perform the same. A service bureau means the business of doing computer data processing work not merely for the owner of the equipment, but commercially for the general public for compensation. (R. 215-6).

The case was tried with a jury (Tr. 15). As to (A) at the close of the plaintiff's evidence the District Court denied the defendant's motion for dismissal (R. 524-7) but granted the said motion at the close of the defendant's evidence (R. 529-593). The basis of the decision was that Phillip B. Fluaatt, the plaintiff's treasurer and office manager, had information at the time of the purchase that the print-out rate of this equipment was relatively slow, that being one of the several defects shown by the evidence.

The fundamental error of the court was in disregarding as irrelevant the evidence that the defendant through Rasmussen further represented to and assured Fluaatt that the print-out rate of this equipment was not significant or important, and that notwithstanding this, the equipment was fully suitable, appropriate and adequate for such service bureau work by the plaintiff, and this was believed and relied upon by the plaintiff in making the purchase, the plaintiff at that time having little or no knowledge concerning the same.

As to (B) the court granted defendant's motion for

dismissal at the close of plaintiff's evidence on the ground that the defendant made such promises and statements to provide future patronage, but that there was not sufficient proof that the defendant had a fraudulent intention not to perform the same (R. 504-7, 526).

Thus the principal questions presented on this appeal are whether, construed with all reasonable inferences most favorably to the plaintiff, sufficient substantial prima facie evidence was introduced to entitle the plaintiff to have the case submitted to the jury as to these issues (A) and (B) or either of them.

The plaintiff's evidence, which was extremely voluminous, may be briefly summarized as follows:

In the autumn of 1961, Chester K. Rasmussen was appellee's manager of accounting and data processing machine sales at Yakima, Washington, where the appellant's place of business was located. During a period of several months Rasmussen contacted and had numerous conferences with appellant's representatives, Earl W. Carlsen, its president and managing director, D Loyd Hunter, its vice president, secretary and chief engineer, and Phillip B. Fluaatt, its office manager and treasurer, in which he was endeavoring to sell this equipment (R. 26-7). One of the departments of appellant's business was previously engaged in service bureau work on a small scale, using only card punch equipment (R. 27, 119-121, 142-3, 215-6, 221-2, 242, 313, 316-8).

As to the said issue (A) Rasmussen in his testimony admitted that he represented to appellant's officers that this NCR 390 equipment was suitable and adequate for service bureau work, and that it was recommended by appellee and himself for that purpose, and that it was being used by numerous other companies for that purpose (R. 27-30, 59, 60). This is confirmed in appellee's answers to interrogatories (R. 12, 18). However, Rasmussen admitted that this was the only sale of NCR equipment that he ever made for service bureau work, and he knew this was being purchased by appellant for that purpose (R. 60-1).

Rasmussen admitted that he understood and intended that appellant in purchasing the equipment would rely upon the statements and representations which he made as being correct (R. 41-2).

Rasmussen gave them typewritten literature stating in effect that large profits would be made by a service bureau using the NCR 390 in that particular area (Ex. 1; R. 148, 333).

The testimony of appellant's officers, Carlsen, Hunter and Fluaitt, establishes by clear, cogent and convincing evidence that in these sales negotiations Rasmussen repeatedly and definitely represented to each of them in various conversations that this NCR 390 equipment was in all respects suitable, appropriate and adequate for such successful profitable service bureau work in the southeast Washington area (R. 98-9, 105, 125-7, 134-5 [Hunter]; 145-6, 220-1, 229, 241 [Flu-

aitt]; 318-326, 332-3, 370, 508, 511-2 [Carlsen]). Rasmussen also represented that this equipment was capable of being easily programmed (R. 330-1). (Please note that by error the reporter's page numbering reverts from 236 to 227 and there is duplicate pagination for ten pages of very important testimony.)

With a minor exception as to Fluaitt hereinafter mentioned, it is undisputed that none of appellant's representatives had any previous knowledge, familiarity or information as to the NCR 390 equipment and no knowledge that Rasmussen's representations were not correct (R. 107, 151, 216, 234, 239, 243-4, 247, 252, 343, 394-5).

Appellant relied upon these statements and representations of Rasmussen and otherwise would not have purchased the equipment (R. 106-7, 151, 334, 369, 371).

In reliance thereon appellant on December 1, 1961, executed the written contract for the purchase of this equipment, the final decision being made by Carlsen (Ex. 2; R. 10, 43, 48, 150-2, 343, 368).

Delivery was not made until almost a year later, in November, 1962, and the equipment was not set up for operation until a month thereafter (R. 61-2, 107, 154-5, 236, 334-5).

Appellant paid to appellee the agreed purchase price thereof in the sum of \$92,490. 67 (Ex. 4; R. 16, 48, 152-3, 335).

In the spring and summer of 1963, after receiving

and using this equipment, appellant and its representatives for the first time became aware of the fact that these statements and representations of Rasmussen as to the suitability and adequacy of the equipment for successful service bureau work were false and wholly incorrect. Its use demonstrated that it was wholly unsuitable and inadequate for that purpose. There were several reasons for this, namely (1) that the input reading rate was too slow; (2) the print-out rate was too slow (only one letter like a fast typewriter, or twelve numerical digits at a time); (3) it was inadequate for doing alphabetical work, which was essential for that purpose; and (4) the memory core, consisting of only 200 cells, was wholly inadequate for such purpose. Also, there were frequent serious malfunctions and breakdowns requiring expensive repairs (R. 108-111, 137, 180-5, 203, 234-7, 229-232, 245-9, 252-3, 265-9, 273-7, 280-6, 336-42, 347-8, 389-93, 401-2, 416, 439-46, 508, 511-4).

Consequently in making such false misrepresentations Rasmussen, as an experienced salesman of such equipment, must either have known that the same were false, or he made the same recklessly without knowledge of their truth.

Appellant made numerous complaints to appellee, and particularly to Rasmussen, as to the inadequate, unsuitable and unsatisfactory operation of the equipment, but appellee wholly disregarded these complaints (R. 89-94, 133-4, 187-8, 348-51, 408-10).

Thereafter in 1965 appellant leased an IBM 1401 machine which did operate successfully for this purpose (R. 256, 291-2, 298, 392, 398-9, 410-1). With considerable difficulty appellant was finally able in January, 1966, to resell this NCR 390 equipment for only \$14,500.00 to a purchaser which was not a service bureau (Ex. 6; R. 358-9, 364, 461, 525).

The NCR 390 equipment is not used by any service bureau at any location (R. 20, 31-3, 302, 304, 351, 417, 440-1; Tr. 21-32).

By reason of these facts appellant sustained a large amount of damages. As hereinabove stated it paid \$92,490.67 for the equipment, and was able later to resell it for only \$14,500.00. The evidence further establishes that at the time of the sale if Rasmussen's statements and representations had been correct the equipment would have had a value of approximately \$125,000.00, but its actual market value at that time did not exceed \$25,000.00. This department of appellant's business was continually operated at a large loss (R. 353-358).

Rasmussen testified that the print-out rate of this NCR 390 equipment was 12 digits per one-half second and that this was a fast and not a slow print-out rate for data processing, as it is faster than a human being can type (R. 30, 62, 64-7). He further testified that the tape reading rate of this unit was fast, nearly 400 characters per second (R. 62-3).

Fluaitt testified that the print-out rate was relatively

slow for some applications and he knew this in a general way previously, but at the time of the purchase he was not at all familiar with this equipment and therefore believed and relied upon the representations and assurances of Rasmussen that the print-out rate was of minor importance and would not interfere with the suitability or adequacy of the equipment for profitable service bureau work (R. 234-5, 227-9, 239, 241, 243-4, 247-8, 394). This testimony, in view of its importance, will be again referred to in the argument. Fluaith never mentioned the print-out rate to Carlsen, appellant's president, who made the final decision (R. 384, 393-4).

Referring now to issue (B), in addition to the testimony hereinabove mentioned, Rasmussen admitted that he told appellant's representatives during the sales negotiations that appellee, through its 27 employees in the area, would procure patronage, customers and business for appellant's service bureau using this equipment. He stated that an additional advantage of this arrangement to appellee and himself was in the sale of in-put unit equipment for punching tape which would be used by such service bureau customers (R. 34-8; Ex. 1). This was confirmed in appellee's answer to interrogatories (R. 13-15).

The testimony of appellant's officers also establishes by clear, cogent and convincing evidence that Rasmussen repeatedly and definitely represented to each of them in various conversations that appellee, through its sales staff, would procure customers and business

for appellant so that it could operate a successful profitable service bureau using this equipment and that it would not be necessary for appellant to have any sales staff of its own for this purpose (R. 98-102, 105, 127-30, 134-6 [Hunter]; 146-50, 229, 241, 243 [Fluaitt]; 320-33, 369, 372-3 [Carlsen]).

Rasmussen also admitted that there was never any intention on his part, or on the part of appellee, to furnish sufficient customers to appellant to make appellant's service bureau a successful profitable operation without any sales staff of appellant soliciting customers (R. 38-41).

He also admitted that after appellant purchased this equipment appellee sent data processing business from Tufts' Drug Stores, a Yakima business, to a service bureau operated elsewhere by appellee. Appellee sold Tufts the input equipment used by it for this purpose (R. 78-80).

In order to further increase appellant's confidence and reliance upon these statements, Rasmussen stated that he would be interested in purchasing stock in appellant corporation because of its anticipated future successful profitable service bureau business. Later, however, when offered the opportunity, Rasmussen refused to do so (R. 57-9, 102-3, 153-4, 320, 328, 371, 381, 413-5, 418).

He told them that if they did not purchase this equipment appellee would sell it to someone else for the purpose of establishing and operating a service bureau

data processing business at Yakima (R. 80-1).

Although sending a few small unprofitable customers to appellant, appellee and Rasmussen wholly failed to carry out or perform these promises, statements and representations as to future patronage, and it clearly appears that there was at all times a fraudulent intention not to perform the same (R. 109-11, 133-4, 179-80, 232, 287, 338, 344-5, 394-6, 398-9, 407-10, 416-7). This was confirmed by letter from appellee's home office (R. 480-1; Ex. 5).

SPECIFICATION OF ERRORS

The district court erred:

1. In sustaining the defendant's challenge of the sufficiency of the evidence as to issue (A) hereinabove mentioned to establish any liability on its part, and in granting defendant's motion for dismissal as a matter of law (R. 529-593).

2. In finding and holding that the plaintiff failed as a matter of law to prove the nine essential elements of fraud (R. 529-593).

3. In finding and holding that plaintiff had knowledge of the falsity of defendant's misrepresentations so as to preclude recovery as a matter of law (R. 586-591).

4. In finding and holding that plaintiff had no right to rely upon defendant's misrepresentations so as to preclude recovery as a matter of law (R. 586-91).

5. As to issue (B) hereinabove mentioned, in grant-

ing defendant's motion for dismissal of plaintiff's claim of misrepresentations by defendant with reference to its securing customers, patronage and profitable business for plaintiff (R. 504-7, 526).

6. In discharging the jury from further consideration of the case (R. 590-3).

7. In entering the judgment and order of dismissal (Tr. 72-3).

8. In denying the plaintiff's motion for new trial (Tr. 75-8).

SUMMARY OF ARGUMENT

1. As to issue (A) hereinabove mentioned the court erroneously held that partial knowledge of Fluaitt as to the relatively slow print-out rate of this equipment on certain applications precluded recovery as a matter of law. But in so holding the court erroneously disregarded as irrelevant the fact that Rasmussen, having far superior knowledge as to the capabilities of this machine, positively assured and represented to them that the print-out rate was of no material importance.

2. As to issue (B) hereinabove mentioned the court erroneously held that there was not sufficient evidence to submit the case to the jury on the theory that Rasmussen fraudulently promised and represented that appellee would furnish sufficient customers and patronage so that appellant would have a successful profitable data processing service bureau business without the necessity for any sales staff assistance by appellant,

and that there was no intention to perform such agreement and it was not in fact performed. Actually, as hereinbefore shown, there was ample prima facie evidence for the submission of this issue to the jury.

ARGUMENT

1. APPLICABLE GENERAL LEGAL PRINCIPLES.

It is of course elementary that in a diversity case such as this the law of Washington governs. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487; *Walla Walla Port District v. Palmberg*, (9 Cir.) 280 F. 2d 237. This was recognized by the district court and all counsel (R. 507).

It is also well settled that a motion for nonsuit of this nature in a jury trial involves no element of discretion and can be granted only when reasonable minds cannot differ and when there is no evidence or inferences from the evidence to support a recovery. As stated in *Messina v. Rhodes Co.*, 67 Wn. 2d 19, 406 P. 2d 312:

“A motion for nonsuit admits the truth of the evidence, *and all inferences arising therefrom*, of the party against whom the motion is made. It requires that the evidence be interpreted most strongly against the moving party and most favorably to the opposing party. *It is only when the court can say that there is no evidence at all to support the plaintiff's claim that the motion can be granted.* (Citing cases) . . .

“We are of the opinion that reasonable minds could differ as to both of the two issues presented by the present case.

“Therefore, the judgment of dismissal is reversed, and the case is remanded for a new trial.”

(All italics herein are ours)

See to the same effect the cases therein cited, and also:

Trudeau v. Haubrick, 65 Wn. 2d 286, 396 P. 2d 805;

Anderson Feed & Produce Co. v. Moore, 66 Wn. 2d 237, 401 P. 2d 964;

Hall v. Puget Sound Dredge & Drydock Co., 66 Wn. 2d 442, 403 P. 2d 41;

Hurst v. Washington Cannery Co-op, 50 Wn. 2d 729, 314 P. 2d 651.

In each of these cases, as well as numerous others, the Washington Supreme Court reversed a dismissal after a nonsuit was granted.

Consequently, since in this case appellant did introduce evidence which, favorably construed, together with the reasonable inferences therefrom, does support a recovery, the court clearly should have submitted the case to the jury under appropriate instructions, and it would have then become the function of the jury to weigh the evidence and make the final determination whether the essential facts were established by the required degree of proof. Refusal to do so therefore manifestly constitutes reversible error.

2. ACTIONABLE MISREPRESENTATIONS AS TO ADEQUACY FOR SERVICE BUREAU WORK.

Referring to issue (A) as to the misrepresentations that this equipment was in all respects suitable, appropriate and adequate for data processing service bureau

work, the evidence as hereinabove summarized amply establishes by clear, cogent and convincing evidence all of the nine essential elements of fraud. As stated by the Washington Supreme Court in sustaining a recovery for fraud in *Swanson v. Solomon*, 50 Wn. 2d 825, 314 P. 2d 655:

“In order to recover for fraud, the following must be proved: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker’s knowledge of its falsity *or ignorance of its truth*; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter’s reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage. *Webster v. L. Romano Engineering Corp.*, 178 Wash. 118, 34 P. (2d) 428. We have also held that *a person cannot defeat recovery by a showing that he did not know his representations were false or that he believed them to be true, if he made them recklessly and carelessly without knowing for certain whether they were true or false.* *Holland Furnace Co. v. Korth*, 43 Wn. (2d) 618, 262 P. (2d) 772, 41 A.L.R. (2d) 1166.”

Referring again to the basis of the court’s decision granting the nonsuit because of Fluaitt’s alleged partial knowledge, he testified as follows:

“Q Did you, Mr. Fluaitt, at that time, have any knowledge or information to the contrary, that is, to the effect that the statements, or any of them, that were made to you by Mr. Rasmussen were not correct?

A No, sir.

Q Specifically, I will ask you whether or not at the time of this purchase you had any knowledge or information on your part that the NCR 390 machine was not suitable or adequate for service bureau work?

- A I did not, no, sir." (R. 151) . . .
- "Q After you received this 390 equipment, just answer this first question yes or no, did you later learn whether or not it was suitable and adequate for service bureau work?
- A Yes.
- Q And what did you later ascertain in that respect?
- A For the jobs requiring a quantity of printing, either alphabetic input or alphabetic output, the 390 is too slow." (R. 180) . . .
- "Q When did you first know what you just stated, that is, that the 390 was not suitable or adequate for service bureau work? When did you obtain definite knowledge of that?
- A Well during the first few months having it on our premises we were learning to operate it, therefore, were learning what its capabilities were, so therefore it was later in 1963 that we ran these

— . . .

THE COURT: His question was, when did you first learn it wasn't adequate. All right, when was that?

THE WITNESS: *The late spring of 1963.*" (R. 184-5)
On cross examination he further testified:

- "Q Now, Mr. Fluaatt, do I understand the first time you ever heard of, saw, or knew anything about an NCR 390 was when Mr. Rasmussen approached you?
- A *The first time I had any direct knowledge of it, yes.*" (R. 216) . . .
- "Q . . . I said that you determined in your own mind, and understood that the printout, in your opinion, was too slow before you even bought the machine?
- A. Yes, *in my relation to a computer of which I knew nothing*, compared to tabulating on card equipment which I was acquainted with.
- Q Tell me, and tell the Court here, when it was that you first determined in your own mind that the printout of this equipment was too slow.
- A As I stated, during our early discussions, it would be too slow for some things . . .

Q In any event, you had arrived at that conclusion?

A *That conclusion, which was offset by Mr. Rasmussen's—*

Q Well, now, you had arrived at it, is that right?

A In a limited fashion, yes." (R. 234-5) . . .

"Q And you already had a line printer on hand, didn't you; and you intended to use this in connection with the NCR 390?

A We would use the equipment — we would hope that we would be able to dispense with the old equipment and use entirely the new.

Q Now actually, Mr. Fluaatt, it was your position and your determination based on your knowledge with respect to this machine, that *it really is not of importance to you whether this equipment reads fast or slow; it is just whether it will do the job*, isn't that right?

A *This was the point of view given to us by Mr. Rasmussen, that these were a minor factor that it printed slowly, that he would be able to provide us jobs and accounts where this would not be so terribly important. The computing portion of the NCR 390 is the part that he played up greatly.*

Q Well, I am not concerned with Mr. Rasmussen. My question relates to your own concept of the importance of whether something is fast or slow. This was of actually no importance to you, at least, in determining to acquire the machine?

A The fact of whether it did or didn't—the fact of *what we were told by Mr. Rasmussen encouraged us to assume that the slowness would be no great problem.*" . . .

"Q What you are telling me is that the statement was made that 'This machine will take care of the data processing work you have, and we will provide for you.' Do you read into that the implication that it will read fast and print out fast?

A No. *I read into it that it will do the things that must be done, whether it reads fast or slow is of no importance, it is the point it will do these things.*" (R. 228b-9b) . . .

"Q And as I understood your testimony earlier, you

have testified you had not seen one of these machines in operation before?

A Not that I recall, sir." (R. 239) . . .

"Q Is it true that so far as the printout of the machine was concerned, its speed, or lack of speed I am referring to now, that you had planned in advance that you were going to do the printing with your other equipment, anyway?

A Not entirely." (R. 241)

On redirect examination he further testified:

"Q At the time of the purchase of this machine, as you have already testified, you had some knowledge as to the slowness of the printout rate. My question is, when this machine was purchased, did you, assuming as you have testified, that it later turned out to be inadequate in its capabilities for service bureau work, my question is, did you have any knowledge at the time of the purchase of this machine as to its inadequacy for service bureau work?

A *I would not be aware of total computer requirements at that date, not being a computer-oriented person.*" . . .

"Q I say, at the time of the purchase of this machine, did you have—assuming that it later turned out to be inadequate—*did you have any knowledge at that time of the inadequacy of the 390 machine for doing service bureau work?*

A *No, sir.*" (R. 243-4)

On recross examination he testified:

"Q Now you tell us, Mr. Fluaith, that at the time you acquired this machine, until after you acquired it, you had *no knowledge of its inadequacies for service bureau work until after it got here and you tried to work with it; is this right?*

A Yes, sir." . . .

"Q So there is an inadequacy, that you call an inadequacy, that you knew about even before you acquired the machine, isn't this true?

A *This again is where Mr. Rasmussen insisted that*

this machine would take care of all of our work, and we assumed—

Q Well, I'm sorry, Mr. Fluaitt." (R. 247-8)

He later learned, after using the equipment that its memory core was insufficient and that the read-in rate was too slow as to alphabetical input (R. 248-9).

Carlsen testified as to Fluaitt:

"Q . . . Now at that time you first observed this did he reveal to you that he had had this knowledge all along, even before the machine had arrived, of the nature of the printout, did he tell you that then?

A He had the knowledge, if any, in relative terms. He had felt that it would be fast enough that we could move the 405 out. *He had no knowledge of computers prior to his indoctrination into the 390.*" (R. 394)

Rasmussen testified that the print-out rate of this equipment *was not slow*, but was fast (R. 30, 62-7).

In the light of this testimony this case is governed by the well settled Washington rule that a purchaser has a right to rely upon assurances of the seller that a defect known to the purchaser is not sufficiently serious as to be substantially detrimental or impair the desirability of the property. Under such circumstances the purchaser's knowledge of such defect does not constitute a defense in his action to recover for fraud.

In *Miraldi v. Wick*, 117 Wash. 207, 200 Pac. 1094, the purchaser of a ranch observed and knew that a substantial portion of it was covered with alkali. Nevertheless the court affirmed recovery by him in a fraud action, saying:

"*The respondent's testimony* is to the effect . . . that he visited the land in company with this person, and while on the land discovered that in a few spots the land was covered with a white substance, and on inquiry was told that it was alkali; that he then inquired what effect alkali had on land and was told that too much would hurt, but that the quantity on this land would not interfere in any way with the growing of crops thereon. The respondent further testified that, on his return to the appellants' offices for further negotiations concerning the lease, he took the matter up directly with the appellants, and was told by them that there was not sufficient alkali on the land to affect the crops; that the small quantity there would act rather as a fertilizer to the crops planted than as an injury to them . . .

"Unquestionably, as the appellants contend, it is the law that where parties deal with each other as strangers with respect to land, and the means of knowledge concerning it are equally open to both, the one may not say that he has been deceived by the representations of the other, even though the representations be false. But the rule is otherwise where the means of knowledge are not equally open, and here they were not so. The respondent, if his testimony is to be believed, did not know that there was alkali in the land *sufficient in quantity* to prevent growing crops thereon; and it was *the duty* of the appellants, if they undertook to inform him on the subject at all, *to inform him truthfully*, and are answerable for the damages suffered by him if they did not so inform him."

The *Miraldi* case was approved and followed in *Rummer v. Throop*, 38 Wn. 2d 624, 231 P. 2d 313. It was an action for fraud in the sale of a ranch due to the damaging effect of magnesium dust from a large plant situated adjacent thereto. The purchaser had full knowledge of the existence of this plant and he had

been warned as to the damaging effects of this dust. He signed a contract agreeing to the restrictions in the recorded deed from the magnesite company which released it from liability for the effects of such dust. Nevertheless the court affirmed a judgment for the plaintiff, and held that he had the right to rely upon the seller's assurances minimizing the effect of the dust. Judge Hamley, speaking for the court, said:

"In the evening of that same day, Rummer was informed by his stepfather that he had better be careful 'getting up in there.' The stepfather warned that 'you are going to get into some dust,' and stated that the plant has given trouble ever since it had been there. . . .

"Appellant's argument in support of these assignments of error is to the effect that respondent had actual and constructive knowledge of the dust condition, and hence had no right to rely upon any representation which Throop may have made on the subject. . . .

"In *Cunningham v. Studio Theatre*, ante p. 417, 229 P. (2d) 890, this court quoted with approval the following statement regarding the right to rely:

" 'The rule is followed at the present time in practically all American jurisdictions, in respect of transactions involving both real and personal property, that one to whom a positive, distinct, and definite representation has been made *is entitled to rely* on such representation and *need not make further inquiry* concerning the particular facts involved. This rule is a corollary to the broad principle of a general right of reliance upon positive statements. Under this rule it is sufficient if the representations are of a character to induce action, and do induce it, and the only question to be considered is whether the misrepresentations actually deceived and misled the complaining party. Under

such circumstances, it is immaterial that the means of knowledge are open to the complaining party, or easily available to him, and that he may ascertain the truth by proper inquiry or investigation.' [23 Am. Jur. 970, Fraud and Deceit, Sec. 161.]

"Tested by this rule, there seems little doubt that Rummer had the right to rely upon Throop's representation. By reason of the information which had come to him through the several sources referred to above, very serious doubts had been raised in Rummer's mind regarding the dust situation. He could have queried neighboring farmers and learned the truth. He could have gone to the county auditor's office and examined the deed, which made specific reference to damage from magnesium oxide dust. Instead, Rummer went to the vender, Throop, for the facts. *Rummer may have been foolishly credulous in doing this, but that would not deprive him of the right to rely.* . . .

"Where a representee makes only a partial investigation, and relies in part upon the representations of the adverse party, and is deceived by such representations, the authorities agree that he has a right to rely, and may maintain an action for such deceit. (Citing cases) . . .

"The rule just stated is particularly applicable where as here, the representation was designed to deter further investigation. . . .

"In *Wescott v. Wood*, 122 Wash. 596, 212 Pac. 144, the decision affirming a judgment for the plaintiff in a fraud action contains this comment:

" 'Indeed, the representations were such as would naturally lead respondent to deem it unnecessary to make any investigation.'

"Assuming that Throop had no duty to volunteer information relative to dust damage, such duty clearly attached as soon as the vendee made specific inquiries of the vendor regarding that matter. It then became Throop's duty to inform Rummer fully

and truthfully, and to say nothing which would deter Rummer from investigating further. In this respect the case before us is much like *Miraldi v. Wick*, 117 Wash. 207, 200 Pac. 1094. There the respondent vendee was permitted to recover damages for fraud, upon a showing that the alkali content of the soil was excessive, even though the vendee had inspected the premises. We said:

“The respondent, if his testimony is to be believed, did not know that there was alkali in the land *sufficient in quantity* to prevent growing crops thereon; and it was the duty of the appellants, if they undertook to inform him on the subject at all, to inform him truthfully, and are answerable for the damages suffered by him if they did not so inform him.’

“It is our opinion, in view of the foregoing considerations, that respondent *had the right to rely upon appellant’s reassurance as to the dust situation*. This representation alone was sufficient to justify rescission, if found to be false. It is therefore not necessary to consider whether the findings of fact relative to the other asserted representations are contrary to the clear preponderance of the evidence.”

We submit that the Rummer case is conclusive, and that Fluaitt had the right to rely upon Rasmussen’s assurances that the print-out rate was sufficiently rapid so that the equipment was fully adequate for service bureau work. These assurances and representations were naturally designed and had the effect of deterring Fluaitt, who admittedly had very little knowledge on the subject, from making any further investigation.

In *Jenness v. Moses Lake Development Co.*, 39 Wn. 2d 151, 234 P. 2d 865, the court reversed a judgment

of dismissal in a fraud case and quoted the Rummer case with approval. Before the sale transaction was closed the purchaser learned that the previous representation that the pinball machines went with the tavern was false, and the purchaser was shown the daily reports, which showed the falsity of the representation as to the income of the business. The court said:

"The second answer to respondents' argument is that, under the rule followed in this state, appellants were under no duty to investigate the representations made to them. . . .

"Tested by the foregoing rules, we conclude that the vendees had a right to rely on the representations. Unquestionably, appellants were naive and credulous, particularly in the light of their experience in the tavern business, but the rule is well settled in this jurisdiction that *a wrongdoer cannot defend his wrongful actions by calling attention to his victim's gullibility.*" (Citing cases)

In *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, the court reversed a judgment of dismissal after granting a motion for judgment n.o.v. and said:

"Plaintiff admitted that he was told, before the trade was consummated, that the motors could be purchased for a less sum of money than he paid; that he had heard that the motors could be purchased for less money; but he says that, when he took the matter up with defendants, they quieted his suspicions and made him believe that they were paying the full price to the electric company. . . .

"The statement of a consideration in an instrument offered for filing is only prima facie evidence of the true consideration. If it were not so, and plaintiff had made inquiry, he would probably have been quieted by the same assurance that satisfied him when he took the matter up with the defendants upon oral rumor.

"Another possible reason is that the court believed that the attorney whom plaintiff had employed in the transaction had notice of the amount that was actually paid to the electric company. We have read the testimony of the attorney and we are not sure that he ever communicated such notice to the plaintiff. Plaintiff says that he did not. . . .

"Remanded with directions to vacate the judgment entered *non obstante veredicto*."

The Forsyth case was quoted, approved and followed in *Scroggin v. Worthy*, 51 Wn. 2d 119, 316 P. 2d 480, which is also conclusive. The purchaser was informed by a third party that the trailer park had been condemned by the health authorities because of a defective sewer. She was assured, however, by the seller that this report was not correct. The court affirmed judgment for the plaintiff and said:

"The appellants argue that the renewal of the fraudulent representations does not relieve respondent of the duty to pursue her independent investigations. *This court held otherwise* in Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490. . . .

"The matter was dealt with at length by the California district court of appeal in *Kalkruth v. Resort Properties*, 57 Cal. App. (2d) 146, 134 P. (2d) 513. It was there said:

" 'When Wells, a stranger to Kalkruth, said the cabin had been built on the wrong lot, Kalkruth immediately and naturally consulted a man who should have knowledge of the facts, namely, the president of the vendor corporation who was active in the management of its affairs. Lyon and Kalkruth returned to the cabin and made measurements. Lyon, who should have known the true facts, assured Kalkruth that everything was all right. *We see nothing unusual in Kalkruth accepting this assurance as true as against a statement of a stranger*

to the contrary. We believe that when, as here, the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated. This rule was applied in *Curtis v. Title Guarantee etc. Co.*, 3 Cal. 2d 612 [40 P. 2d 562, 42 P. 2d 323], where it was said:

“Respondent testified that when she saw the university buildings were not being constructed she talked to an agent of respondent, [appellant] who explained the delay by informing her that representatives of the university were in the east raising money. This apparently quieted her fears and she made her payments. Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract the vendor cannot urge the failure of the vendee to rescind within the time during which the vendee’s fears of fraud have been lulled by such representations. (*Cooper v. Huntington*, supra, [178 Cal. 160 (172 P. 591)].)’ (See, also, *Lozier v. Janss Investment Co.*, 1 Cal. 2d 666 [36 P. 2d 620].)

Such, likewise, was the rule followed in *Converse v. Blumrich*, 14 Mich. 108; *McWilliams v. Barnes*, 172 Kan. 701, 242 P. (2d) 1063; *Bagdasarian v. Gagnon*, 31 Cal. (2d) 744, 192 P. (2d) 935. See, also, 37 C.J.S. 278, 281, Sec. 34(d).

“Moreover, caveat emptor does not apply to a misrepresentation of a material fact made for the purpose of inducing a sale. That subject was quite recently considered by the United States court of appeal in *Byrnes v. Mutual Life Ins. Co.*, 217 F. (2d) 497 (C.C.A. 9th), in which District Judge Yankwich announced the court’s conclusions in the following language:

“‘In the olden days, under the doctrine of caveat emptor, courts were inclined to think that a man dealt with another at his peril and that he should

be on the lookout for possible deception, failing which, he would be penalized as negligent in failing to discover the fraud that was being perpetrated on him. The modern rule is against such an attitude. A man who deals with another in a business transaction has a right to rely upon representations of facts as the truth. Restatement, Torts, Sec. 540; Prosser on Torts, pp. 748-749; 23 Am. Jur., Fraud and Deceit, Sec. 1446; Illinois Bankers' Life Ass'n v. Theodore, 1934, 44 Ariz. 160, 34 P. 2d 423; Lahay v. City Nat. Bank, 1891, 15 Colo. 339, 25 P. 704; Seeger v. Odell, 1941, 18 Cal. 2d 409, 415, 115 P. 2d 977, 136 A.L.R. 1291. These authorities sustain the view that one who has intentionally deceived another shall not be heard to say that the other person should not have trusted him. As the Supreme Court of Vermont said in an old case,

“ ‘No rogue should enjoy his illgotten plunder for the simple reason that his victim is by chance a fool’. Chamberlin v. Fuller, 1887, 59 Vt. 247, 256, 9 A. 832, 835, 836.’ ”

“This court reached the same conclusion in Wooddy v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054.”

In *Holland Furnace Co. v. Korth*, 43 Wn. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166, the court affirmed a judgment in favor of the purchaser in a fraud action involving the sale of a furnace. Judge Hamley, speaking for the court, said:

“But where the salesman does assert such special and peculiar knowledge, and the buyer relies thereon, *a statement that the article is appropriate for, and will satisfactorily meet, the buyer's requirements will be regarded as a representation of fact.* Holcomb & Hoke Mfg. Co. v. Auto Interurban Co., 140 Wash. 581, 250 Pac. 34; Weller v. Advance-Rumely Thresher Co., 160 Wash. 510, 295 Pac. 482. See, also, 51 A.L.R. 46, 81, annotation.

“Under the findings of fact summarized above,

this case is governed by the rule announced in the Holcomb and Weller cases. The requirement that the representation be of an existing fact has therefore been met.

“Another essential element necessary to establish actionable fraud is that the speaker must have ‘knowledge of its falsity or ignorance of its truth.’ (Italics ours.) . . .

“The italicized portion of the above-quoted language from the Webster opinion is but another way of stating the rule that if a person represents as true material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know his representations were false, or that he believed them to be true.”

In *Coson v. Roehl*, 63 Wn. 2d 384, 387 P. 2d 541, the court sustained a recovery by the purchaser and said:

“Recently, this court had occasion to notice that there has been a

“‘. . . marked change in judicial attitude during the last half century toward the question of justifiable reliance . . .’ *Johnson v. Olsen*, 62 Wn. (2d) 133, 135, 381 P. (2d) 623 (1963) . . .

“The policy reasons behind the majority rule are discussed in the classic case of *Angerosa v. White Co.*, 248 App. Div. 425, 290 N.Y.S. 204 (1936):

“‘. . . To deny relief to the victim of a deliberate fraud because of his own negligence would encourage falsehood and dishonesty,’ . . .

“‘. . . In this jurisdiction protection is given to one who is injured by falsehood or deception; fraud vitiates everything which it touches, and destroys the very thing which it was devised to support; the law does not temporize with trickery or duplicity. A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper, and it makes no difference

whether the fraud goes to the factum, or whether it is preliminary to the execution of the agreement itself . . .

“Plaintiff argues that the contract shows on its face that defendants were to pay \$71.88 per month for a period of 60 months. The product of these figures (\$4,312.80) would have been apparent to defendants had they been facile with mental arithmetic. This, of course, is in direct conflict with the written price of \$3,500.00, defendants’s insistence that they would pay no more, and the agents’ representations that \$3,500.00 would include all charges. *Misrepresentations frequently have the effect of causing the other party to fail to use the means of knowledge within his power.*

“One authority said:

“ ‘The modern tendency is certainly toward the doctrine that failure to use available means of knowledge because of reliance on misrepresentation, even negligent failure to use them, because of trusting to a misrepresentation, will not excuse positive willful fraud or deprive the defrauded person of his remedy.’ 3 Williston on Sales (rev. ed.) Sec. 634.

“We conclude, as did the trial court in the first instance, that fraud vitiates the contract, and that defendants are not foreclosed by the merger clause of the contract from placing reliance upon the fraudulent representations.”

In *Fossum v. Timber Structures, Inc.*, 54 Wn. 2d 317, 341 P. 2d 157 (a breach of warranty case involving a building collapse), plaintiff submitted the truss plans of the warehouse building to his own designer. The court affirmed a judgment for the plaintiff saying:

“From the evidence, the jury could have believed that, in showing the truss plans to Sanford, respondents were merely assuring themselves that the trusses would fit in with the over-all construc-

tion of the warehouse. An implied warranty of fitness may exist even though the buyer's reliance on the seller's skill and judgment is not a total reliance, and the buyer has relied on his own judgment as to some matters and on the seller as to other matters. *Drager v. Carlson Hybrid Corn Co.*, 244 Ia. 78, 56 N.W. (2d) 18 (1952)."

So long as there was substantial evidence supporting appellant's right of recovery, the weighing of the evidence to ascertain whether there was clear, cogent and convincing evidence must be performed by the jury as the trier of the facts. The court's decision herein was clearly contrary to this principle.

In *Bland v. Mentor*, 63 Wn. 2d 150, 385 P. 2d 727, in affirming judgment for the plaintiff in a fraud action the court said:

"We have defined substantial evidence as that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed . . .

"We have said that the phrase 'clear, cogent, and convincing' evidence denotes a quantum or degree of proof greater than mere preponderance of the evidence . . .

"We do not deem the term connotes proof beyond a reasonable doubt.

"What constitutes clear, cogent, and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the surrounding facts and circumstances. *Whether the evidence in a given case meets the standard of persuasion, designated as clear, cogent, and convincing*, necessarily requires a process of weighing, comparing, testing, and evaluating—a function best performed by the trier of the fact, who usually has the advantage of actually

hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor.

"The appellate function should, and does, begin and end with ascertaining whether or not there is substantial evidence supporting the facts as found. *Gilbert v. Rogers*, 56 Wn. (2d) 185, 351 P. (2d) 535 . . .

"The presence or absence of fraud, in a given transaction, presents a question of fact. *Pletcher v. Porter*, 177 Wash. 560, 33 P. (2d) 109. Fraud can be established by the direct testimony alone of an interested party. *Floyd v. Myers*, 53 Wn. (2d) 351, 333 P. (2d) 654. On the other hand, fraud need not be established by direct and positive evidence. *It may be proved, in whole or in part, by circumstantial evidence.* *Karr v. Mahaffay*, 140 Wash. 236, 248 Pac. 801."

The trial court here committed the same error as in *Trudeau v. Haubrick*, 65 Wn. 2d 286, 396 P. 2d 805. In reversing a dismissal the court said:

"We think that the trial judge erred on several grounds: First, *belief or disbelief of the testimony is for the jury.* . . .

"It is our opinion that the trial judge did not give the required 'favorable inferences' to the testimony for the plaintiff, but, instead, that he discounted it to support his decision to take the case from the jury."

In *Jacquot v. Farmers Straw Gas Producer Co.*, 140 Wash. 482, 249 Pac. 984, the court held:

"It is actionable fraud to induce the sale of the right to manufacture and sell farmers' gas plants by false representations as to the cost and places at which the gas plants could be manufactured *at a reasonable profit.*" (Syll. 1)

In *Holcomb & Hoke Mfg. Co. v. Auto Interurban Co.*, 140 Wash. 581, 250 Pac. 34, the court held:

“Representations inducing a sale of a popcorn machine are actionable representations of fact and not mere expressions of opinion, where plaintiff represented that he had defendant’s place of business under observation for several days and had computed the amount of his business as an expert, and therefrom *represented the amount of the defendant’s net profits if he would buy a machine*, which representations were false and fraudulent.” (Syll. 1)

See, also, to the same effect:

Petersen v. Graham, 7 Wn. 2d, 464, 110 P. 2d 149;

Hobson v. Union Oil Co., 187 Wash. 1, 8, 59 P. 2d 929 (and see dissenting opinion);

Weller v. Advance-Rumely Thresher Co., 160 Wash. 510, 295 Pac. 482;

Nyquist v. Foster, 44 Wn. 2d 465, 268 P. 2d 442;

Lambach v. Lundberg, 177 Wash. 568, 33 P. 2d 105;

Gaines v. Jordan, 64 Wn. 2d 661, 393 P. 2d 629 (last three paragraphs);

Brown v. Underwriters at Lloyds, 53 Wn. 2d 142, 332 P. 2d 228;

Marr v. Cook, 51 Wn. 2d 338, 318 P. 2d 613;

McInnis & Co. v. Western Tractor & Equipment Co., 63 Wn. 2d 652, 388 P. 2d 562; and 67 Wn. 2d 965, 410 P. 2d 908.

See also the following decisions of this Court which are to the same effect:

Hartwell Corp. v. Bumb, (9 Cir.) 345 F. 2d 453, Cert. denied, 382 U.S. 89;

Shepard v. Cal-Nine Farms, (9 Cir.) 252 F. 2d 884;

Byrnes v. Mutual Life Insurance Co., (9 Cir.), 217 F. 2d 497.

The court therefore clearly committed reversible error in discharging the jury and dismissing the action as a matter of law.

3. ACTIONABLE MISREPRESENTATIONS AS TO FUTURE PATRONAGE

Referring now to issue (B) the evidence clearly establishes, as hereinabove stated, that Rasmussen, as an inducement for the purchase, repeatedly and definitely represented and promised to appellant's representatives that appellee, through its sales staff of 27 men in the area, would procure sufficient customers and patronage for appellant so that they could operate a successful profitable service bureau business using this equipment, and that it would not be necessary for appellant to have any sales staff of its own for this purpose (R. 98-102, 105, 127-30, 134-6, 146-50, 229, 241, 243, 320-33, 369, 372-3).

The basis of the court's decision granting the non-suit as to this claim was that there was not sufficient proof of his fraudulent intention not to perform the same. However, this was clearly erroneous for at least three reasons:

1. Rasmussen himself admitted that there was no such intention. He testified:

"Q *Was there ever any intention on your part, or as far as you know, on the part of NCR, to furnish sufficient customers to the plaintiff to make the plaintiff service bureau a profitable operation, without any sales staff of the plaintiff soliciting customers? . . .*

A *No—my answer is no.*

Q *You did not have such intention?*

A No. (R. 38-41)

2. Moreover this was definitely confirmed by the letter of September 14, 1964, to appellant from appellee's home office signed by J. R. Madison, its manager of accounting machine sales. This was in answer to paragraph 3 of appellant's letter, which stated:

"We feel we have not received all the support possible from the NCR people in referring essential clients to our data service. Only two of the machines NCR supplied to their customers in our area are using our service."

In answer to that, appellee's letter stated:

"Unfortunately, and this is not the first time this has come to our attention, *it is absolutely impossible for our local field sales organization to direct their efforts toward the sale of specific types of equipment which in effect could provide punched paper tape or card input for service operation.* Actually when we entered into this type of business *we advised all our branches and related personnel of the danger of indicating that under any circumstances the customer would be assured of specific sales volumes as related to providing processing income for any independent service bureau or NCR service bureau anywhere in the United States.*" (Ex. 5, par. 3, R. 480-1)

3. Furthermore this is definitely confirmed by the fact that appellee and Rasmussen wholly failed at any time to perform this promise and representation. They procured a few customers for appellant, but only to a small and limited extent, and there was at all times a fraudulent intention not to perform the same (R. 109-11, 133-4, 179-80, 232, 287, 338, 334-5, 394-6, 398-9, 407-10, 416-7).

There was certainly sufficient *prima facie* evidence for the case to be submitted to the jury under appropriate instructions. The case comes within the well settled principle that where a promise to do something in the future is made with the fraudulent intention not to perform the same, it is actionable the same as a misrepresentation of an existing fact.

As stated in *Jacquot v. Farmers Straw Gas Producer Co.*, 140 Wash. 482, 249 Pac. 984, *supra*:

“As to the second of the representations, it is undoubtedly the general rule that a promise to do something in the future is not, although it may not be performed, a ground upon which to predicate an action of fraud. *But the rule has an exception as well established as the rule itself.* If the promise is made for the purpose of inducing a party to enter into an agreement which he would not otherwise enter into, and with a present intent on the part of the person making the promise not to perform, *it is a fraud on which an action can be predicated.* Hewett v. Dole, 69 Wash. 163, 124 Pac. 374; Lovell v. Dotson, 128 Wash. 669, 223 Pac. 1061; Kritzer v. Moffat, 136 Wash. 410, 240 Pac. 355. . . .

“As to question of intent, we are clear that it was for the jury. What the intent of the appellants was must be gathered from their conduct as a whole.”

In *Hobson v. Union Oil Co.*, 187 Wash. 1, 59 P. 2d 929, *supra*, the court said:

“Counsel notes an exception to this general rule, which they quote from 26 C.J. 1093, as follows:

“‘Since *the state of a man’s mind is as much a fact as the state of his digestion*, the weight of authority holds that if the falsity of the statement can be established, the misrepresentation of opinion, belief, or intent is an actionable representation of fact. This redress may be had for the dishonest

expression of an opinion contrary to that really entertained by the speaker . . . ’

“Further, there was the notice dated March 23, 1934, terminating the contracts, which was not long after the second contracts were executed. Certainly, there was evidence of facts and circumstances from which *the jury had the right to conclude an intention* contrary to that inferred from the statement, ‘I do not see any reason why you should not stay here the full term.’ ”

In *Kritzer v. Moffat*, 136 Wash. 410, 240 Pac. 355, 44 A.L.R. 681, the court said:

“Their allegations are, in effect, that the appellant made certain representations and certain promises with reference to matters then under consideration between them, which representations were false and which promises he then had no intention of keeping or performing. . . . *That such an action will lie, the authorities generally hold.*

. . . .

“In *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, 483, occurs Lord Bowen’s well-known dictum that:

“*‘The state of a man’s mind is as much a fact as the state of his digestion.* It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.’ . . .

“In *Hill v. Gettys*, 135 N.C. 373, 47 S.E. 449, the court said:

“‘When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense.’ *Goodwin v. Horne*, 60 N.H. 485. *‘The intent is always a question for the jury,* and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immedi-

ately preceding or following it.' Des Farges v. Pugh, 93 N.C. 31, 53 Am. Rep. 446.

"In 26 C.J. 1093, this language is found:

" 'Since the state of a man's mind is as much a fact as the state of his digestion, the weight of authority holds that if the falsity of the statement can be established the misrepresentation of opinion, belief, or intent is an actionable representation of fact. This redress may be had for the dishonest expression of an opinion contrary to that really entertained by the speaker, especially if he is an apparently disinterested third person, or if a deliberately false opinion is expressed in terms importing personal knowledge of its truth, or for a promise made with the present intent of future breach. . . .

"But we are equally clear that the plaintiffs had a remedy at law. If the appellant made false statements and promises which he did not intend to keep, and thereby lulled the plaintiffs into the forbearance of a legal right to their injury, it was a fraud for which an action at law will lie. . . .

"It is next contended that a promissory statement cannot be the basis of an action for deceit, and that here the statements are of this sort. But the doctrine is true only to a limited extent. *A fraudulent promise which induced a person to act in such a way as to affect his legal right, or to alter his position to his injury, is actionable.* Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 Pac. 175.

"It is next urged that the evidence is insufficient to sustain the verdict. We have carefully examined the testimony, and, while its perusal has convinced us that the jury could well have found for the other side, we find *substantial evidence on all of the issues necessary to support the plaintiff's case.* This ends the inquiry in this court. . . .

"Our powers are limited to the inquiry whether there is substantial evidence in support of the verdict."

In *Federal Finance Co. v. Cass*, 235 N.W. 579, the Supreme Court of Nebraska said:

"It has been held in the case of *Larmon v. Knight*, 140 Ill. 232, 30 N.E. 318, 33 Am. St. 229, that *the evidence of evil intent at the time the promise was made may be inferred from a failure to comply with the promise, and that the promisor may be presumed to have intended when he made the promise to do what he finally did do.*"

The federal cases are to the same effect:

Equitable Life & Casualty Insurance Co. v. Lee, (9 Cir.) 310 F. 2d 263;

Philadelphia Storage Battery Co. v. Kelley, (8 Cir.) 64 F. 2d 834, certiorari denied, 290 U.S. 651;

Woods-Faulkner & Co. v. Michelson, (8 Cir.) 63 F. 2d 569, 573;

Howard v. Howe, (7 Cir.) 61 F. 2d 577, certiorari denied, 289 U.S. 731;

Seaboard Terminal & Refrigeration Co. v. Droste, (2 Cir.) 80 F. 2d 95, 96;

Hirsch v. Archer, (2 Cir.) 258 F. 2d 44.

See also to the same effect:

37 C.J.S. 231, 237, Sec. 11, 12, and cases cited;

Annotation 51 A.L.R. 46, 63-81, 94, 163, and cases cited;

23 Am. Jur. 789, Sec. 32;

Kausky v. Kosten, 27 Wn. 2d 721, 179 P. 2d 950;

Murdoch v. Leonard, 1 Wn. 2d 37, 95 P. 2d 37;

Peterson v. Hicks, 43 Wash. 412, 86 Pac. 634.

CONCLUSION

We therefore respectfully submit that as to both issues (A) and (B) hereinabove mentioned appellant established a sufficient prima facie case, and the court erred in discharging the jury and dismissing the action as a matter of law.

Respectfully submitted,
ELWOOD HUTCHESON
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

ELWOOD HUTCHESON
Attorney

APPENDIX

Index of Exhibits

Admitted

P-1	Documents re negotiation of sale	R. 7
2	Equipment orders, sales contracts and lease contract	7
3	Letters to plaintiff from defendant in Dec. 1961, re equipment order	7
4	Checks (3)	7
5	Correspondence between parties (5 letters)	7
6	Agreement for resale of equipment and invoice	525
10	Answers to interrogatories	20
D-27	Advertisement	403

No. 22000

United States
Court of Appeals
for the Ninth Circuit

Fruit Industries Research Foundation, d/b/a
Food Industries Research & Engineering,

Appellant

vs.

The National Cash Register Company,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE WILLIAM N. GOODWIN, *Judge*

JOHN GAVIN
GAVIN, ROBINSON, KENDRICK,
REDMAN & MAYS
Attorneys for Appellee

Office and P. O. Address:
410 Miller Building
Yakima, Washington 98901

FILED

001-101037

SEP 11 1967

WM. B. LUCK, CLERK

INDEX

Additional and Counter-Statement of the Case	1
Summary of Argument	10
Argument	12
Issue (A)	14
Issue (B)	35
Conclusion	40

TABLE OF CASES

<i>A.B.C. Packard, Inc. v. General Motors Corp.</i> , 275 F. 2d 63	14
<i>Andrews v. Standard Lbr. Co.</i> , 2 Wn. 2d 294, 97 P. 2d 1062 (1940)	35, 36
<i>Ashheim v. Pigeon Hole Parking, Inc.</i> , 175 F. Supp. 320, affirmed 283 F. 2d 288	14
<i>Baertschi v. Jordan</i> , 68 Wn. 2d 478, 413 P. 2d 657 (1966)	13, 35
<i>Brown v. Underwriters at Lloyds</i> , 53 Wn. 2d 142, 332 P. 2d 228 (1958)	13
<i>Columbia Intern. Co. v. Perry</i> , 54 Wn. 2d 876, 344 P. 2d 509 (1959)	13
<i>Dobbin v. Pacific Coast Coal Co.</i> , 25 Wn. 2d 190, 170 P. 2d 642 (1946)	14
<i>Dragos v. Plese</i> , 39 Wn. 2d 521, 236 P. 2d 1037 (1951)	30
<i>Forsyth v. Davis</i> , 152 Wash. 595, 278 Pac. 67 (1929)	40
<i>Forsyth v. Dow</i> , 81 Wash. 137, 142 Pac. 490 (1914)	26

<i>Guier v. Shaw</i> , 48 Wn. 2d 48, 290 P. 2d 702 (1955)	30
<i>Jenness v. Moses Lake Development Co.</i> , 39 Wn. 2d 151, 234 P. 2d 865 (1951)	26
<i>Ketner Bros., Inc. v. Nichols</i> , 52 Wn. 2d 353, 324 P. 2d 1093 (1958)	30
<i>Korth v. Holland</i> , 43 Wn. 2d 618, 262 P. 2d 772 (1953)	35
<i>Lowenthal Co. v. McCormack Bros. Co.</i> , 144 Wash. 229, 257 Pac. 632 (1927)	18, 29
<i>Michaelson v. Hopkins</i> , 38 Wn. 2d 256, 288 P. 2d 759 (1951)	30
<i>Miraldi v. Wick</i> , 117 Wash. 207, 200 Pac. 1094 (1921)	26, 28
<i>Nyquist v. Foster</i> , 44 Wn. 2d 465, 268 P. 2d 442 (1954)	32
<i>Puget Sound Nat'l Bank v. McMahon</i> , 53 Wn. 2d 51, 330 P. 2d 559 (1958)	13, 29
<i>Rocky Mountain Fire & Cas. Co. v. Rose</i> , 62 Wn. 2d 896, 385 P. 2d 45 (1963)	18, 29
<i>Rummer v. Throp</i> , 38 Wn. 2d 624, 231 P. 2d 313 (1951)	26
<i>Schlaadt v. Zimmerman</i> , 206 F. 2d 782	35
<i>Scroggin v. Worthy</i> , 51 Wn. 2d 119, 316 P. 2d 480 (1957)	27
<i>Shook v. Scott</i> , 56 Wn. 2d 351, 353 P. 2d 431 (1960)	32, 33, 35
<i>Webster v. Romano Engineering Co.</i> , 178 Wash. 118, 34 P. 2d 428 (1934)	35, 36
<i>Williams v. Joslin</i> , 65 Wn. 2d 696, 399 P. 2d 308 (1965)	13

<i>Williams v. United Brotherhood of Carpenters</i> , 12 Wn. 2d 171, 120 P. 2d 833 (1942)	35
--	----

OTHER CITATIONS

3 CJS, Agency, Sec. 262	18
-------------------------------	----

No. 22000

United States
Court of Appeals
for the Ninth Circuit

Fruit Industries Research Foundation, d/b/a
Food Industries Research & Engineering,

Appellant

vs.

The National Cash Register Company,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

ADDITIONAL AND COUNTER-STATEMENT
OF THE CASE

Although the statement of the case in the brief of appellant is substantially correct in presenting the basic questions involved and in detailing the rulings and proceedings of the trial court, nevertheless some additional statement of the case and counter-statement is essential for the issues to be brought into proper perspective.

The pretrial order, which presented the issues and the only issues before the trial court, reveals that the appellant, Fruit Industries, was bringing an action against the appellee, National Cash Register Comapany, for claimed fraudulent representations in two particulars:

(A) An alleged false representation that its equipment known as NCR 390 was suitable, appropriate and adequate for service bureau data processing and computer work; and

(B) An alleged false representation that the appellee would aid, assist and cooperate with the appellant in sending and furnishing customers to it and that appellant would not need any sales force itself to obtain patronage (Tr. 36-43).

With respect to (A), the claimed lack of adequacy of the equipment, the pretrial order reflects that this alleged inadequacy involved only claims that (1) the print-out and reading rate of the equipment was too slow, (2) that the memory core was not large enough, and (3) that the equipment lacked the capacity of handling alphabetical work. No other issues were tendered or litigated in the trial court, and the trial court carefully confined the evidence under (A) to the issues presented in the pretrial order and did not allow them to be expanded or enlarged when proper objection was made by the appellee (R 189-191; 75-78; 83-84; 329-331; 335; 339-340; 345-47). For example, no issue was tendered or considered relating to claims of breakdowns or extensive repairs such

as is intimated by the appellant in its statement of the case in its brief on page 7. (R. 339-340; Tr. 36-43). Neither was there any issue involving the proper or improper programming of the machine, as indicated on page 6 of its brief (Tr. 36-43).

It appears clearly from the record that the principal officer of the appellant, who dealt with the representative of appellee in negotiating for the purchase of the NCR 390 was Philip Fluaidd, who was its treasurer, office manager, and the man in charge of the computer and data processing department of the appellant corporation (R. 217-18). Mr. Fluaidd was the one who dealt principally with Chester K. Rasmussen, the local representative of National Cash Register (R. 213-14; 217-18). He was one of two agents of appellant who was given computer training with respect to the equipment following its purchase and prior to its delivery, and he was the person who initially directed the operation of the equipment after it was placed in use by the appellant (R. 83; 235). With respect to the specific claims of deficiency in the equipment asserted by Fruit Industries, Fluaidd testified:

1. So far as the print-out rate of the equipment being slow, he testified that he knew this before the purchase was ever made (R. 235); that he was so well advised about it that he had actually intended to and did place in line and operate another piece of more rapid

print-out equipment to work with the NCR 390 after it was received (R.241-242; 227). He stated that Rasmussen did not represent that the print-out rate of the equipment was fast and to him this was not important whether it was fast or slow (R. 229). He also testified he had formed an opinion that the machine was not working properly before it was ever delivered (R. 240-241).

2. Neither Fluaitt, nor anyone else for that matter, testified that the in-put reading rate of the equipment was misrepresented or was regarded as a factor in the company's claimed unsuccessful operation of the equipment (R. 235-236). Its expert testified that the in-put reading rate was adequate (R. 451).

3. Fluaitt, as well as all others, testified that the equipment would do alphabetical work, contrary to the contention in the prettrial order (R.236, 451), and stated that the alphabetical ability of the machine was known by appellant; had not been misrepresented before its purchase (R. 249).

4. Fluaitt testified that the memory core of the equipment was not misrepresented in any way, and was exactly as described in the literature which was submitted to the company prior to its purchase (R. 233-234; 249).

5. Fluaitt testified that Rasmussen had never guaranteed that the operation would be "profitable" (R. 222).

With respect to Exhibit 5, a projected example of possible income submitted to the appellant by Rasmussen, Fluaitt testified that he did not believe the figures and placed no reliance on them prior to purchase (R. 223).

6. Fluaitt further testified that notwithstanding his criticism of the machinery *it could have operated profitably and successfully with sufficient customers of a certain type* (R. 250-251).

With respect to (B), the officers of the appellant corporation all asserted that Rasmussen had agreed with them that he would, *in the future and after* the equipment was purchased and in place, advise his sales staff of the fact that a data processing center with NCR equipment was located in Yakima and would encourage future customers to be obtained by the appellee to send their work to that center, and they also asserted that Rasmussen told them it would be unnecessary for them to hire a sales staff in the future and represented that he would provide work for them *in the future* which would make their operations profitable (R. 132; 147-9; 326). Mr. Rasmussen on the other hand, flatly and categorically denied that he had ever told the appellant company that it would not need a sales force or that he would supply the sales force (R. 37). He flatly denied that he guaranteed any profitable operation to the appellant corporation (R.36). The appellee did agree and Rasmussen testified that he told

the prospective purchaser that he, Rasmussen, would tell any future customers his people might obtain about the service bureau of appellant and Mr. Rasmussen would encourage any to use the service bureau of appellant (R. 34-36).

Regardless of what testimony is believed, the record is clear that Rasmussen was not making representations about any existing fact, but, at the most, was making a promise to perform some act in the future. The evidence established that Rasmussen and the appellee company *did* obtain customers for the appellant after it set up the equipment and *did* bring prospective customers to the service bureau of appellant, and did encourage its contacts to use the service of the appellant (R. 68-73; 155-160).

In the statement of the case contained in the brief of the appellant, gratuitous references are incorporated with respect to matters which have no place in this appeal, and other statements are made which the record does not support.

On page 7 of the brief, a matter to which appellee has already adverted, the statement is made that "serious malfunctions and breakdowns requiring expensive repairs" occurred. Whether repairs were or were not required is not an issue in the case, no contention being made that there were any representations that the equip-

ment would not require repairs, and such evidence was rejected by the court as immaterial (R. 339-340). In any event, the record does not show that there were frequent "breakdowns" or "expensive repairs".

It is also contended by appellant on page 7 that it made numerous complaints to Rasmussen as to the unsuitable and unsatisfactory "operation of the equipment" and it is said that appellee "wholly disregarded" these complaints. The references to the record, namely R. 89-94, 133-4, 187-8, 348-51, 408-10, reveal respectively, as follows: that Rasmussen said that any complaints which were made to him were complaints by the appellant of its own inadequacies and inability to operate the equipment; a complaint by Hunter, one of the officers of Fruit Industries, that more work should be provided for the machine; testimony by Fluaitt that he complained of delays in repair and Fluaitt testified he knew of no other complaints; and the complaints of Carlsen concerning the programming of the machine and statements by Carlsen that he complained about the inadequate machine to Rasmussen, admitting at the same time that he was asking Rasmussen to get more work for the equipment.

On page 8 of its brief, the appellant states that it acquired an IBM machine in 1961, and that it resold the NCR 390 equipment for a sum less than it paid for it. The evidence actually indicates that the equipment which it

acquired was a newer, larger, and considerably more recent and expensive model than the NCR equipment which it had, and that it was acquiring the larger equipment because of its increased business and business capacity. (R. 291-293; 544-45; 492-93; 450-1).

The statement on page 8 that the NCR 390 equipment is not used by any service bureau is not only immaterial, but unsupported by the record. The references to the record contained in the brief of appellant are: R.20, 31-3, 302, 304, 351, 417, 440-1; Tr. 21-32. An examination of the record at these pages indicates that Rasmussen testified that he did not know and could not say what NCR 390 equipment was then in use; the witness, Loveless, who was the then employee and data processing operator for appellant, testified that he did not know of any such equipment; the witness Carlsen attempted to testify that he had conducted a "survey" concerning the NCR 390 and his attempted testimony was not permitted and stricken for obvious seasons; and the expert witness for appellant, James Powell, an operator in Portland, testified he did not know of NCR 390 equipment in service bureau work at the time of trial and testified that since 1962 the trend had been to replace smaller machines with larger and more expensive ones (R. 450). The reference to the transcript (Tr. 21-32) reveals the true picture: No one can say how many of the 3,000 NCR

390's that had been sold (R. 304) are being used for service work or not being used, because some purchasers who bought them for private use have converted them to service bureau use and others who bought them for service bureau use have converted them to private use (Tr. 21-32). In any event, the whole subject matter is immaterial and should not have been introduced into the statement by the appellant.

On page 8, appellant sets forth a claim concerning its alleged damages, and asserts it had large losses from operating the equipment. All of this, of course, is beside the point involved on appeal. In any event a reference to the record will indicate that the figures set forth represent the concept of Earl Carlsen with reference to the value of the equipment, and examination of his testimony will quickly indicate how weak it was and how wrong and mistaken he was about the values (R. 353-8; 359-65). The evidence with respect to the loss in operations was permitted by the trial court only as bearing on the question of what Rasmussen's intentions may have been at the time of the sale, so far as issue (B) is concerned (R.161-179).

Appellant also asserts in its statement of the case that the appellee sent business of a Yakima concern from the area to another outside service bureau. This again is a statement of a matter wholly unconnected with the

/

issues on appeal. A simple reference to the record will show that there was a valid reason for Tufts forwarding its special in-put material for processing. The NCR 390 did not read this type of material (R.78). The court will note that the issues involved on appeal require only a consideration of the evidence offered by the appellant, and that is all the evidence that the appellant has brought to this court. It did not bring here any of the evidence offered by the appellee in the lower court, and this of course was proper. But it now ill becomes appellant, having brought only its own evidence to this court, to cite it to the court in connection with matters which were clearly disputed and which are extraneous to the issues tendered on appeal.

SUMMARY OF ARGUMENT

Under the law of the state of Washington, a recovery for alleged fraud can only be had by presenting clear, cogent and convincing evidence in support of all nine elements which the law holds constitute a fraud. Failure to establish any one of the elements by clear, cogent and convincing evidence is fatal to the claim. The appellant has failed to offer sufficient evidence or inference from the evidence, taken most favorably to the appellant, to establish any claim for fraud under the applicable law prescribing the quantum of evidence required.

With respect to the issue involving the alleged inadequacies of the equipment, the evidence falls far short of establishing by clear, cogent and convincing evidence or inference therefrom that any false representation was made with respect to the capacity of the equipment. It appears that the equipment and its capacity were not falsely represented. The only claim of deficiency in performance of the equipment which appellant has supported by any evidence is a claim that it had a slow print-out rate. It affirmatively appears from the evidence that the appellant knew of the slow print-out rate before it purchased the equipment, and planned to compensate for it, and that the appellant did not rely upon and had no right to rely upon any representation with respect to the print-out rate. To the extent that appellant seeks to convert the representation relied upon - - that is, that the equipment was adequate for service bureau work - - into a representation that the equipment would operate successfully or profitably, it is not relying upon a misrepresentation of an existing fact but the alleged nonperformance of a future promise, which cannot support an action for fraud, nor does the evidence tend to establish that appellant relied or had a right to rely on such claimed representation.

With respect to the issue involving the claim that the appellee promised to obtain future patronage for the

equipment sold, the appellant is again attempting to recover for alleged fraud by reason of claimed breach of a future promise, and an action in fraud will not lie. To the extent that the appellant claims there was a present fraudulent intention not to perform a future promise to provide patronage, the evidence is wholly insufficient to establish such an intent, and, indeed, the evidence establishes an intent by the appellee to perform its voluntary commitment in this respect, and establishes that it did perform such voluntary commitment.

ARGUMENT

The appellee will follow the pattern of the brief of appellant and argue the claim of fraudulent misrepresentation with respect to the equipment under heading (A) and the claim of fraudulent misrepresentation with respect to obtaining future patronage under heading (B).

The appellee agrees that this is a diversity case and that the law of Washington governs. The appellee does not agree that the basis for determining the validity of the dismissal of the action is whether there is some evidence or inference from some evidence to support a recovery. The proper measure that was applied by the trial court at the conclusion of hearing evidence was whether or not there was any *clear, cogent and convincing evidence or inferences* therefrom to establish a clear, cogent

and convincing right of recovery, this being a fraud and not a breach of contract action.

Primarily, the principles of law announced by the Supreme Court of Washington, and which were the law of that state at the time of trial and now, should be kept in mind. The nine essential elements of fraud which must be established are: 1. A representation of existing fact; 2. its materiality; 3. its falsity; 4. the speaker's knowledge of its falsity, or his ignorance of its truth; 5. an intent by the speaker that the person to whom the representation is made should rely thereon; 6. ignorance of its falsity by the person to whom the representation is made; 7. the latter's reliance upon the truth of the representation; 8. his right to rely; and 9. his consequential damage.

Lack of any of these elements is fatal to the cause of action. *Puget Sound National Bank v. McMahon*, 53 Wn. 2d 51, 330 P. 2d 559 (1958).

Fraud must be proved by clear, cogent and convincing proof. *Williams v. Joslin*, 65 Wn. 2d 696, 399 P. 2d 308 (1965). *Baertschi v. Jordan*, 68 Wn. 2d 478, 413 P. 2d 637 (1966) *Brown v. Underwriters at Lloyds*, 53 Wn. 142, 332 P. 2d 288 (1958).

Honesty is presumed, and the burden of proving fraud is upon the party alleging it. *Columbia Intern. Co. v. Perry*, 54 Wn. 2d 876, 344 P. 2d 509. (1959)

The presumption is against the existence of fraud and in favor of innocence, the presumption against fraud approximating in strength the presumption of innocence of crime. *Dobbin v. Pacific Coast Coal Co.*, 25 Wn. 2d 190, 170 P. 2d 642 (1946).

This court has followed these principles in diversity cases. *A. B. C. Packard, Inc. v. General Motors Corp.*, 275 F. 2d 63; *Asheim v. Pigeon Hole Parking, Inc.*, 283 F. 2d 288.

(A)

Tested by the foregoing principles, did the appellant offer sufficient evidence to establish fraud with respect to the alleged representations of Rasmussen concerning the equipment itself? The pretrial order and the evidence in the case confined this issue to an assertion by the appellant that Rasmussen and the company had represented that the NCR 390 was suitable and adequate for service bureau work. The response of the appellee to this was that the machine was suitable and adequate for such work and sold for that purpose (Tr. 36-45; 21-32). Thus we have an admitted representation made concerning the equipment, and the first inquiry is to determine whether such a statement was false. The appellant contend the statement was false and that the equipment was not suitable for service bureau work because the machine was allegedly deficient in the following particulars:

1. The print-out and reading rate thereof were too slow.
2. The memory core was not large enough.
3. The equipment lacked the capacity of handling alphabetical work. (Tr. 36-43)

It is conceded that the mechanical print-out and reading rates of the equipment were not misrepresented to appellant before the purchase of the equipment, and it is not established or indeed claimed that the print-out and reading rate of the equipment when it was supplied was any different than it was represented or known to be by the appellant when it purchased the equipment. It is not contended that the size of the memory core of the equipment supplied was different than it was represented to be to the appellant when it purchased the equipment. It is not claimed to the contrary, but indeed admitted, that the equipment would handle alphabetical work. Under this state of the record it is difficult to comprehend how it can be claimed that there was clear, cogent and convincing evidence that the representations of the defendant with respect to the equipment itself were false. An examination of the record is convincing that the appellant is simply complaining that it purchased a piece of equipment for service bureau work which, under its method of operation, did not turn out to be as profitable as it hoped that it might be, and that it eventually abandoned the use

of this smaller NCR 390 equipment and installed some larger and considerably more expensive equipment with which it is now apparently satisfied. (R. 291-293) The fact is, and the record supports that fact, that the appellant did carry on service bureau work with the equipment from 1962 until into 1966. (R. 236, 240) That it did not come up to the projected business desires of the appellant could be due to a variety of causes, such as lack of patronage, inefficiency of the appellant in operating the equipment, failure of the appellant to program the equipment properly, or, as appellant contends, that the equipment was too slow. But appellant has brought an action in *fraud*, claiming that the manufacturer of the equipment, the appellee, misrepresented the capacity of the equipment, while at the same time it admits that the capacity of the equipment furnished was no different than what it was represented to be before the purchase. Appellant is in the position of one who purchases a 1961 model truck for the purpose of hauling freight upon the representation of the seller that the truck is suitable for hauling freight, and then claims that he has been defrauded because, while admitting that the truck does haul freight and has been used by him for hauling freight, says that it does not haul the freight often enough, rapidly, or in the amount which he hoped that it would or as his new 1966 model does.

What appellant has actually tried to establish on this phase of the case is a breach of a claimed warranty, which is entirely different from fraud. The difficulty which appellant would have in supporting a claim for breach of warranty is obvious, because from the record it appears that it kept and used the machine in its business month after month for more than three years after it was installed, before it sold and replaced it with a larger and later model machine, and because its contract would obviate such an action at such a late date. (Exh. 2) It is also apparent that the gist of the claimed misrepresentation with respect to the equipment asserted by the appellant is that it printed too slowly. Despite all the hue and cry about programming, repairs and other extraneous matters, the record shows that this is the only real complaint which appellant has concerning the performance of the equipment it bought. The appellant is vigorous in its denunciation of the equipment on this one ground, but that is not a substitute for clear cogent and convincing evidence that the equipment was misrepresented in this respect and that the appellant relied upon and had a right to rely upon the representations of the seller in this respect. Mr. Fluaitt, the agent and officer of the appellant, who principally negotiated the purchase knew before the company ever bought it that its print-out rate was slow, and planned before purchase to use another piece of printing equipment to supplement the print-out of the NCR 390. He not only planned to do

this before its purchase, but actually did carry out his intention after the purchase. As appellant states, Mr. Fluaitt apparently never got around to telling the managing director and principal officer of the appellant, Earl W. Carlsen, that he knew the print-out rate was slow before Carlsen decided to purchase the equipment, but this is of no comfort to appellant. The corporation is affected with constructive knowledge of all material facts of which its agent acquires knowledge while acting in the course of his employment, although the agent does not in fact inform the principal thereof. 3 CJS, Agent, Sec. 262; *Lowenthal Co. v. McCormack Bros. Co.*, 144 Wash. 229, 257 Pac. 632; *Rocky Mountain Fire & Gas Co. v. Rose*, 62 Wn. 2d 896, 385 P. 2d 45 (1963).

It is clear that Mr. Fluaitt knew of the print-out rate of the equipment he purchased, had made provision for other equipment to increase the print-out rate, that the print-out rate was not represented to him to be greater than it was, and the appellant is hardly in a position under these circumstances to claim its reliance upon and its right to rely upon any representations attributed to the appellee company in this respect. Certainly the record would hardly support a finding that the alleged reliance by the appellant and its right to rely upon representations concerning the print-out rate, in-put rate, size of memory core and alphabetical capacity of the equipment is sup-

ported by any evidence that could rise to the dignity of being called *clear, cogent and convincing*.

In its brief the appellant cites at length from the evidence of Fluaitt in an attempt to evade the impact of his testimony, but its references to his testimony contained on pp. 15-19 of its brief do not give the true impact of the Fluaitt testimony because of certain omissions therefrom, omissions of testimony which constituted the basis for the ruling of the trial court that the appellant, by reason of the admitted knowledge of Fluaitt, had no right to rely on claimed misrepresentations of the appellee concerning the capabilities of the equipment being purchased. For example, there are omissions commencing at the bottom of page 16 of the brief of appellant, and the entire testimony of Mr. Fluaitt on these pages was as follows (R. 234 [first page 234] -229).

“Q Tell me, and tell the Court here, when it was that you first determined in your own mind that the printout of this equipment was too slow.

A As I stated, during our early discussions, it would be too slow for some things.

Q And you understood that before the equipment was actually purchased?

A Yes, sir.

Q Did you explain that to Mr. Carlsen and Mr. Hunter, that you knew the printout was too slow?

A It is possible, I do not know.

Q What would be your best recollection, considering that this was an important transaction of business in your company?

A I don't recall.

Q In any event, you had arrived at that conclusion?

A That conclusion, which was offset by Mr. Rasmussen's —

Q Well, now, you had arrived at it, is that right?

A In a limited fashion, yes.

Q Now did you, prior to your acquisition of it, and in your discussions with Mr. Rasmussen, from September up to December 1, discuss the read-rate of this equipment?

A It is probable.

Q Do you have any recollection of ever having done so?

A I don't recall.

Q Do you have any recollection now that the reading rates of which this machinery is capable after you acquired it were any different or less, perhaps than Mr. Rasmussen represented them to be before you decided to buy the machine?

A No.

Q Do I understand that you say this machine is incapable of producing alprabetical work?

A I did not say it was incapable; I said it does it too slowly. It does it too slowly for volume work.

Q In other words, we are not to understand, are we, that this equipment does not produce alphabetical work. It does, doesn't it?

A It will read alphabetical characters, and print alphabetical characters, but will not assemble, compute, or store.

Q So we may understand this further, Mr. Fluaitt, before you even acquired this machine, you had IBM equipment that was line printing equipment, is that right?

A Yes.

Q Would you explain to these folks what you mean by line printing equipment?

A Equipment which prints one line at a time. All the characters are determined by the input we put into this — all the keys come up at one time, so a full line of print — our machine I believe has eighty-eight type bars and they all print at once.

Q In other words, to use an illustration, you had equipment already on hand in which if we wanted to print the expression "Now is the time for all good men to come to the aid of their country," — I don't know whether that has more than eighty-eight figures in it, but as an illustration, you had equipment that would print that whole line on a piece of paper, and keep printing it, is that right?

A Yes.

Q The 390 type of alphabetical work you describe as

something like an automatic typewriter, that would print N-o-w i-s t-h-e, and so forth, and would run it off as a fast typewriter?

A Yes.

Q Now as a matter of fact you knew before you even acquired this, based upon your experience in the field, and the fact that you already had a line-type printer on hand to use, that this was the distinction between the two, didn't you?

A It was different, yes.

Q Well you know this before you even acquired it; you knew that the 390 printed one character at a time, and was not a line printer?

A Yes, sir.

Q Well let me ask you if you did not, to refresh your recollection, testify in your deposition — do you remember when it was taken, Mr. Fluaatt?

A Yes.

Q I am on Page 58, Line 7. Do you remember this question being asked:

“Question: What you are telling me is that the statement was made that ‘This machine will take care of the data processing work you have, and we will provide for you.’ Do you read into that the implication that it will read fast and print out fast?

“Answer: No. I read into it that it will do the things that must be done, whether it reads fast or slow is of no importance, it is the point it will do these things.”

Now did you so testify?

A Yes, sir."

Again advertng to the references to the testimony contained in the brief of appellant upon the re-cross examination of Mr. Fluaidd, it is important to have all and not part of his testimony on these points in mind. He testified:

"Q Now you tell us, Mr. Fluaidd, that at the time you acquired this machine, until after you acquired it, you had no knowledge of its inadequacies for service bureau work until after it got here and you tried to work with it; is this right?

A Yes, sir.

Q What were the inadequacies?

A It could not produce some jobs rapidly enough to satisfy the customers.

Q Your printout rate was too slow?

A In some cases, yes.

Q Now are you going to tell us you didn't know that inadequacy before you acquired it?

A No, sir.

Q So there is an inadequacy, that you call an inadequacy, that you knew about even before you acquired the machine, isn't this true?

A This again is where Mr. Rasmussen insisted that this machine would take care of all of our work, and we assumed —

Q Well, I'm sorry, Mr. Fluunitt.

MR. GAVIN: I am sorry to have to interrupt, your Honor, but this is unresponsive.

THE COURT: Don't apologize to me. You can interrupt him any time you wish if he doesn't answer your question.

MR. GAVIN: Well I hate to interrupt witnesses, but I move to strike it as non-responsive.

THE COURT: Your question was that he knew about this inadequacy even before he acquired the machine, isn't that right; and he has already answered yes, that he knew that.

MR. GAVIN: Yes. All right, thank you.

Q (By Mr. Gavin) What other inadequacies did the machine have, other than its slow printout? What other inadequacies that you later discovered, Mr. Flusitt?

A We could not put a large program into the machine.

Q Why not?

A Because it did not have enough cells or memory.

Q So you say the cells of memory you found out later were inadequate, is this right?

A For the jobs that were involved.

Q Yes. Now am I to understand that you claim Mr. Rasmussen misrepresented the size of the memory core of this equipment to you?

A No, sir.

Q All right, what other inadequacy that you say you later found out?

A The slowness of the read in of our alphabetic input.

Q Yes. I think you have told us already that you appreciated by your own experience in the field that you were buying a piece of equipment that printed alphabetically, character by character, rather than a line printer, isn't that right?

A Yes.

Q So this was knowledge you had before the machine ever arrived there?

A Yes, sir.

Q As a matter of fact, Mr. Fluaidd, your opinion of this equipment at the time your deposition was taken last August is that you felt at that time if you could have acquired enough customers, that the bureau would have operated profitably with this equipment, is that right?

A With a volume of customers, perhaps yes.

Q In other words, the inadequacies you are talking about with regard to the machine, regardless of what you call them, it was your opinion at least when the deposition was taken that if enough customers had been produced for you, or you had enough customers, it would have operated successfully as a service bureau in any event?

A If we had enough customers like Birdseye, no sir. Like the credit unions, yes, sir.

Q Well, did you testify as follows, I am on page 35, Line 18 of the deposition, Counsel: — I mean 20:

“Question: I take it you have a feeling that the customers or clients were there ready to be obtained by somebody, is that right, that would have made this a successful operation if somebody had gone out and got the customers and clients and brought them in, you would have had a successful operation with this equipment?”

“Answer: I believe so.

A Yes, sir.

Q And that is right, isn't it?

A I made that statement.

The appellant, in its argument in connection with issue (A), takes the position that its representative, Mr. Flauitt, was entitled to rely upon the claimed representations of Mr. Rasmussen concerning the equipment, even though Flauitt knew of the slow print-out rate of the equipment before purchasing it, because it is claimed that somehow Rasmussen overcame the admitted knowledge of Flauitt about the slow print-out rate and deceived him or prevented him from making further inquiry or investigation about the matter. In this connection, the appellant relies principally on the cases of *Miraldi v. Wick*, 117 Wash. 207, 200 Pac. 1094, *Rummer v. Throop*, 38 Wn. 2d 624, 231 P. 2d 313, *Jenness v. Moses Lake Development Co.*, 39 Wn. 2d 151, 234 P. 2d 865, *Forsyth v. Dow*, 81 Wash.

137, 142 Pac. 490 and *Scroggin v. Worthy*, 51 Wn. 2d 119, 316 P. 2d 480.

The cited cases establish the principle that in cases in which a purchaser is *suspicious* about the goods to be purchased, or *suspicious* of some defect that might exist in the goods, and undertakes an inquiry concerning same or makes direct inquiry of the seller concerning same and the seller wrongfully and deceitfully dissuades the purchaser from making further inquiry or gives him direct assurances that his suspicions are unfounded, then the purchaser is entitled to rely upon these false representations of the seller even though he may have some knowledge or suspicion himself concerning the matter.

Of course that is patently not the situation that we have in the case at bar. Mr. Fluaitt did not merely have some *suspicion* that the equipment had a slow print-out rate and make inquiry about it, and Mr. Rasmussen did not represent that the print-out rate was any different than it actually was, but here, Mr. Fluaitt *knew* that the equipment had a slow print-out rate, knew the type of print-out with which the machine was equipped, already had in his possession a more rapid printer with which he intended to overcome the slow print-out rate, and actually put this piece of equipment into operation with the NCR 390 after it was delivered. Under these circumstances the appellant had no right at all to rely on any lack of speed as a basis

for asserting that the transaction was touched with fraud.

It appears in *Miraldi v. Wick, supra*, the first case cited by appellant, that the purchaser observed some white substance on the property being purchased and asked the seller what it was and was told that it was alkali, that too much would hurt the production of the land but that the amount that he saw was not enough to hurt the growing of crops, and the seller thus deceitfully persuaded the purchaser not to make further inquiry. It is typical of the other cases cited. In the case at bar the situation is as different as if the purchaser in *Miraldi v. Wick, supra*, had direct knowledge that the alkali was in sufficient quantity to restrict crop production, and already had in his possession and intended to use leeching out equipment to overcome the alkali problem and did use it on the land after he acquired it.

The case at bar is analogous to those cases in which a purchaser having equal knowwledge or having an opportunity to investigate the claims of the seller, either does so and satisfies himself as to the validity of them or, having the unhindered opportunity to do so, fails to do so. In such cases there is no basis for claiming that the purchaser can rely on any representation. Here Fluaitt observed the equipment in operation before it was delivered, and actually concluded in his own mind that it did not

operate properly, (R. 240-1) but apparently failed to reveal his information to the other officers of the corporation. (R.384, 393-4) But what he knew bound the corporation. *Lowenthal Co. v. McCormack Bros. Co.*, 144 Wash. 229, 257 Pac. 632; *Rocky Mountain Fire & Casualty Co. v. Rose*, 62 Wn. 2d 896, 385 P. 2d 45 (1963).

There is a failure to show any reliance upon the representations in this respect by that clear, cogent and convincing evidence which the law of Washington requires. The Washington court has not hesitated to dismiss an action for fraud when there has been a failure to establish reliance by that quantum of proof. In *Puget Sound National Bank v. McMahon*, 53 Wn. 2d 51, 330 P. 2d 559 (1958), a plaintiff purchased certain apartment house property. The seller told the representative that there was new plumbing throughout the apartments and the equipment and furniture were new and in good condition. He also made representations concerning the net profits of the apartment house operation. The purchaser observed the condition of the plumbing, furniture and equipment and *knew* what it was, *and could base no claim of fraud on these representations*. The court also found that the representation with respect to the net profits was not to be relied upon because the purchaser *knew* from her own experience in connection with such a business that such represented profits were not correct. In this case we have Mr.

Fluaitt with knowledge of the slow print-out of the machine, and we have him stating that with respect to the projected profits shown to him in the brochure submitted by Mr. Rasmussen, (Exh. 1), that he, Mr. Fluaitt, did not believe these figures. (R. 223).) The Washington court said:

“In an action for fraud, the burden is upon plaintiff to prove the existence of *all* the essential and necessary elements ‘that enter into its composition,’ (See *Webster v. L. Romano Engineering Corp.*, *supra*) one of which is that the representee had a right to rely upon the representation. All of the ingredients must be found to exist. The absence of any one of them is fatal to a recovery. To be remedial, a representation must have been of such a nature and have been made in such circumstances that the injured party had a right to rely on it. It is this element that the trial court found was missing in the instant case.

* * *

“The evidence has failed to establish one of the essential and necessary elements that enters into the composition of fraud, and the judgment must be affirmed.”

See also *Michaelson v. Hopkins*, 38 Wn. 2d 256, 288 P. 2d 759 (1951); *Guier v. Shaw*, 48 Wn. 2d 48, 290 P. 2d 702 (1955); *Ketner Bros. Inc., v. Nichols*, 52 Wn. 2d 353, 324 P. 2d 1093 (1958); *Dragos v. Plese*, 39 Wn. 2d 521, 236 P. 2d 1037 (1951).

Under issue (A), appellant also urges that the alleged representations concerning the equipment, and, in parti-

cular, representations concerning its printout rate, are actionable by expanding the representation concerning the equipment from one that the equipment would be suitable and adequate for service bureau work into one that it would be suitable and adequate to *successfully and profitably* perform service bureau work. Appellant then urges that the equipment, as operated by it, did not perform profitably and accordingly claims fraud. Leaving aside for the moment the fact that the issue tendered in the pre trial order was whether the equipment was or was not represented to be suitable for service bureau work, and not whether it would or would not produce a profitable operation for appellant, (Tr. 36-43), it should be noted that this alleged expanded representation immediately raises the question of whether or not it is one of existing fact, which is necessary to support an action of fraud. Although the trial court basically granted a dismissal of the action as to issue (A) on the grounds that the appellant was not entitled to rely on any representations in this respect, the trial court was also correct in its dismissal because the representation, if it is tied to future profits, then becomes not a representation of existing fact, but a statement as to future performance or a representation that something will be done or occur in the future and is not actionable.

The Washington court has specifically laid down the rules governing the determination of whether a representa-

tion is one of existing fact or an expression of opinion about something to take place in the future. The guidelines for this determination are set forth in *Shook v. Scott*, 56 Wn. 2d 351, 353 P. 2d 431 (1960), citing from *Nyquist v. Foster*, 44 Wn. 2d 465, 268 P. 2d 442:

“It is helpful to consider the reasons supporting the usual rule that fraud can be predicated only upon representations of existing fact. Among the several reasons stated by authorities are the following: (a) A statement as to future performance is a “mere estimate” of something to take place in the future; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; (b) “. . . a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made;” 23 Am. Jur. 799, 801 § 38; See, also *Rankin v. Burnham*, 150 Wash. 615, 274 Pac. 98; and (c) “. . . were the rule otherwise, any breach of contract would amount to fraud; and that to permit a rescission for fraud by one who has no ground for complaint except an unfulfilled promise—a broken contract—would obscure elementary distinctions between remedies, and tend to nullify the Statute of Frauds.” 51 A. L. R. 46, 61, Annotation.’

“The proper test to apply, in determining whether a representation pertains to an existing fact or is a mere expression of opinion or a promise, was set forth in that case in these words:

“ “. . . Where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon particular future use, or future requirements of the representee, then the representation is not of an existing fact. . . . ”

Tested by those guidelines, the satisfaction of the thing claimed to be represented, that is, a profitable service bureau operation, is necessarily dependent upon the occurrence of future events, future uses and future requirements of the representee, Fruit Industries. In the *Shook* case, *supra*, the representation involved the volume of water that would be available to the purchaser in connection with his use of the property in the future. The amount of that water depended on future uses and future events. In this case, whether the appellant, in using the equipment, would return a profit to itself depended on the volume of business, its efficiency of operation, its customer relations, and a variety of other factors which only the future would establish.

Further, it is apparent that the appellant did not rely upon any claimed representation of Mr. Rasmussen concerning the amount of income the operation would produce, for Mr. Fluaith himself testified as follows:

“Q All right. And did Mr. Rasmussen at any time when you were present, Mr. Fluaith, in these conversations, guarantee to you that this operation you were going to enter into was going to be profitable?

A No guarantee.

Q All right. I think your counsel presented to you Exhibit 1. If I am not mistaken, didn't Mr. Hutcheson show you that and ask you for some comments on it, in your direct examination yesterday?

A Yes, sir.

Q When this was presented to you — in the first place, was this presented? I am sure you said it was, during some conversation with Mr. Rasmussen.

A Yes.

Q When you were present. You understood this was an example, did you not, of what might be done with the 390?

A Yes.

Q And as a matter of fact, you didn't yourself believe at that time, or upon that presentation, that the example of income reflected on it could be obtained?

A That's true.

Q And you therefore did not rely upon those figures of potential income in making any judgment of your own about this equipment?

A Not these incomes listed here."

The trial court was manifestly correct in dismissing the action so far as it involved issue (A) by reason of a lack of any clear, cogent and convincing evidence or inference therefrom establishing that appellant relied on or had a right to rely on representations concerning the equipment itself. Its dismissal is also correct by reason of the fact that there was no clear, cogent and convincing evidence that the representations concerning the equipment

were false, and if they are to be regarded as representations that the equipment could be operated profitably, they were not representations of existing fact but expressions of opinion only and not actionable.

(B)

It is abundantly clear that the representation attributed to Mr. Rasmussen prior to the purchase that he, Rasmussen, would aid, assist and cooperate in furnishing business and patronage to the appellant and that appellant would not need a sales force, can be nothing but promise to perform a future act, and cannot be possibly characterized as a representation of an existing fact. As we have already seen, statements of things to happen in the future or promises to do something in the future are not actionable in a claim for fraud. *Webster v. Romano Engineering Co.*, 178 Wash. 118, 34 P. 2d 428; *Williamson v. United Brotherhood of Carpenters*, 12 Wn. 2d 771, 120 P. 2d 833 (1942); *Shook v. Scott*, *supra*; *Korth v. Holland*, 43 Wn. 2d 618, 262 P. 2d 772 (1953); *Baertschi v. Jordan*, 68 Wn. 2d 478, 413 P. 2d 657 (1966); *Andrews v. Standard Lumber Co.*, 2 Wn. 2d 294, 97 P. 2d 1962 (1940). *Schlaadt v. Zimmerman*, 206 F. 2d 782.

The representations claimed to be actionable in *Webster v. Romano Engineering Co.*, *supra*, and *Andrews v. Standard Lumber Co.*, *supra*, and which were held by the Washington court not to be actionable, are very simi-

lar to the representations upon which the appellant founds its action in this case. In the *Webster* case, the seller assured the purchaser that the grader which he was going to buy would perform work for which it was intended to be used under the existing conditions, and it failed to perform in this manner. The Washington court said:

“* * * the representations relied upon by appellant cannot form the basis of an action for deceit. They are expressions of opinion about something to take place in the future, namely, what the grader would do under certain conditions. They relate neither to a past transaction nor to an existing fact.”

In the *Andrews* case, the seller represented to the buyer that if he would enter into a contract to build a home, the seller would use a so-called Pabco plan, and that under the plan the seller would control and supervise the construction of the home and that by using it the home could be completed for \$3700.00, free and clear of all liens. When the house was built, it was found that \$3700.00 was not sufficient to build the house, and liens were filed against it. The Washington court said:

“It is quite obvious that the representations did not relate to an existing fact, but only to the results that would obtain by the use of the Pabco plan, that is, that the cost of the building would not exceed \$3,700. Appellant did not sell the Pabco plan or anything else to respondents. All it did was to extoll, through its agent, the virtues of the plan and explain how, by following its provisions, respondents would get a com-

pleted house without any liens or encumbrances against it."

Appellant impliedly admits that we are here dealing with a promise of a future performance rather than a representation of an existing fact, but urges that if there was a present intention not to perform the future promise that an action for fraud can be predicated thereon. The trial court recognized the right of the appellant to attempt to establish intent by showing the conduct and actions of the appellee so that there would possibly be some basis for a trier of the fact to draw therefrom the inference of what the intention of the speaker was. The record reveals that Mr. Rasmussen and the employees of the appellee did, whether it be pursuant to the commitment appellant claims was made or pursuant to the program which Mr. Rasmussen had in mind, supply patronage and customers to appellant and did interest its prospective customers in using the service of appellant (R. 68-73; 155-160).

If evidence had been offered that Rasmussen and the employees of the appellee never contacted anyone or contacted prospective customers but made no mention of the service bureau of appellant and sent no one to appellant, some inference might be drawn from that conduct of a lack of intention to perform a future promise. But there is no such evidence. There is nothing at all in conduct of appellee which would indicate an intention

other than to interest customers in using the service of the appellant. Certainly there is no clear, cogent and convincing evidence that the conduct of the appellee would permit an inference of a dishonest intention not to perform a future promise.

In its brief, appellant points to but two items in the record which it claims' supports its contentions in this respect. It is asserted that Mr. Rasmussen "admits" that there was no intention on his part to perform the promise to furnish customers to the appellant. This statement is based upon a misinterpretation of an answer by Rasmussen to a question put to him, and intentionally ignores the context in which the question was asked and answered over what appellee submits was a valid objection on its part. On examination by counsel for the appellant, Mr. Rasmussen was asked if there was not an arrangement by which he would sell in-put equipment to his customers for later use of appellant service bureau. He specifically denied there was any such arrangement. (R. 35) He was asked if he had made a statement that his company would bring sufficient customers to the appellant so as to make it a "good, profitable, going enterprise." He flatly denied making any such statement (R. 36). Counsel having received answers in which Mr. Rasmussen denied any arrangements or agreements to furnish sufficient customers so that appellant would have a profitable operation, then

asked him if he had any "intention" to furnish sufficient customers to produce a profitable operation for the appellant. To this question objection was interposed, and the court permitted a yes or no answer, and of course Rasmussen responded in the negative (R. 38-41). The question was impossible to answer. The witness was put in a position in which he had to answer in the negative because if he answered in the affirmative, he would then be admitting what he had just denied. This situation hardly affords appellant a basis for seriously arguing that there is some clear, cogent and convincing evidence that Mr. Rasmussen did not intend to perform a future promise when the record shows that the promise was performed. No evidence was offered that there were more customers available that could have been contacted and were not contacted in the area.

The appellant also refers to Ex. 5, in particular a letter of September 14, 1964, written almost three years after the transaction between the parties had been consummated. The letter, from NCR to Fruit Industries, contains a statement that the company had advised its personnel of the danger of assuring any specific sales volumes to independent service bureaus in the United States. The appellant apparently wants to draw the inference from this statement that NCR was admitting that Rasmussen guaranteed some specific sales volume. Of course no such

inference can be logically drawn, but a quick answer to the contention is that the officers of the appellant never claimed that Rasmussen did assure them of any specific sales volume. One of their principal officers, Mr. Hunter, testified that no dollar volume was mentioned by Rasmussen (R. 131). Mr. Fluaitt testified that he did not place any reliance on the only figures that Mr. Rasmussen provided (R. 223).

The trial court was correct in holding that with respect to issue (B), at the end of appellant's evidence, that it was not relying upon a claimed misrepresentation of present fact for recovery, but upon a promise to perform in the future, and that there was no evidence or inference therefrom arising to the level of *clear, cogent and convincing*, which would permit the submission of the issue to a trier of fact.

CONCLUSION

It is a truism stated by the Washington Supreme Court in *Forsyth v. Davis*, 152 Wash. 595, 278 Pac. 67, that "Every case of this character must rest upon its own facts, subject to certain general principles." It is also a truism, as stated by the court, that other opinions are seldom of more than general assistance in determining whether the facts in a particular case do or do not support a claim for fraud. But applying general principles to this case and reading the record in its entirety cannot help

but be convincing that the trial court was clearly correct in dismissing this action. There was no evidence offered by the appellant, or inference from that evidence, which reached the level of being clear, cogent and convincing with respect to either of the two contentions advanced by the appellant. There was no showing that the alleged representations were false, that they were other than expressions of opinion, and it appears in any event, that appellant had such background and knowledge of the business at hand that it could not be said to have relied or to have had a right to rely on the representations. A reading of the record in its entirety, appellee submits, is most convincing that appellant had at best a complaint of alleged nonperformance of a contractual agreement or warranty, and, to be most charitable, had mistaken its proper remedy. It is not even clear in the record that it had any valid complaints in that regard, and of course all of the evidence is not before the court. The judgment of dismissal of the trial court should be affirmed.

Respectfully submitted,

JOHN GAVIN

GAVIN, ROBINSON, KENDRICK,
REDMAN & MAYS,

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

JOHN GAVIN,

Attorney for Appellee.

No. 22000

In the
United States Court of Appeals
For the Ninth Circuit

FRUIT INDUSTRIES RESEARCH FOUNDATION, d/b/a
FOOD INDUSTRIES RESEARCH & ENGINEERING,
Appellant

vs.

THE NATIONAL CASH REGISTER COMPANY,
Appellee

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

ELWOOD HUTCHESON
Attorney for Appellant

314 Miller Building
Yakima, Washington

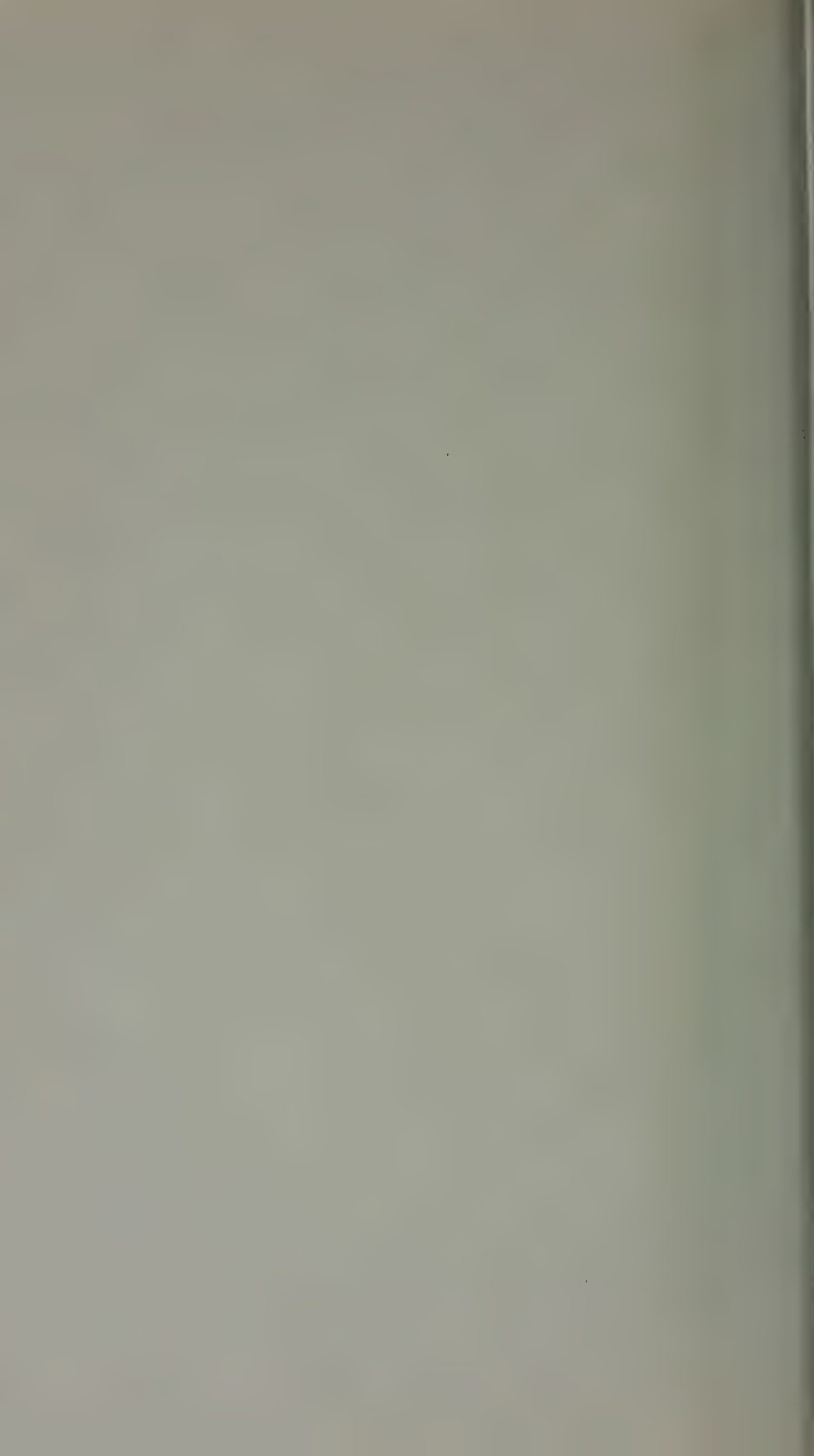
FRANKLIN PRESS  YAKIMA, WASH.

FILED

NOV 7 1967

WM. B. LUCK, CLERK

NOV 10 1967



INDEX

	<i>Page</i>
Issue (A)	1
Issue (B)	12
Conclusion	14

TABLE OF CASES

A.B.C. Packard, Inc. v. General Motors Corp., 275 F. 2d 63	11
Arthurs v. National Postal Transport Ass'n, 49 Wn. 2d 570, 304 P. 2d 685	5
Asheim v. Pigeon Hole Parking, Inc., 283 F. 2d 288	11
Bland v. Mentor, 62 Wn. 2d 150, 385 P. 2d 727	7
Citizen's Casualty Co. v. Jones, (10 Cir.) 238 F. 2d 369, cert. denied, 352 U.S. 103	12
Colagrossi v. Hendrickson, 50 Wn. 2d 266, 310 P. 2d 1072	5
Continental Casualty Co. v. Thompson, 369 F. 2d 157	8
Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662	12
Higgins v. Shenango Pottery Co., (3 Cir.) 256 F. 2d 504	12
Holland Furnace Co. v. Korth, 43 Wn. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166	11
Main v. Western Loan & Building Co., 167 Wash. 1, 8 P. 2d 281	9
Nyquist v. Foster, 44 Wn. 2d 465, 268 P. 2d 442	11
Puget Sound National Bank v. McMahon, 53 Wn. 2d 51, 330 P. 2d 559	9
Rocky Mountain Fire & Casualty Co. v. Rose, 62 Wn. 2d 896, 385 P. 2d 45	12
Rummer v. Throop, 38 Wn. 2d 624, 231 P. 2d 313	7, 9

	<i>Page</i>
Schlaadt v. Zimmerman, 206 F. 2d 782	14
Schram v. Burt, (6 Cir.) 111 F. 2d 557	12
Shook v. Scott, 56 Wn. 2d 351, 353 P. 2d 431	9, 10-11, 13
State v. Jackson, 72 W.D. 2d 49, 431 P. 2d 615	6
State v. Zorich, 72 W.D. 2d 31, 431 P. 2d 584	5
Vickerman v. Kapp, 167 Wash. 464, 9 P. 2d 793	9

OTHER CITATIONS

3 C.J.S. 197, sec. 264	12
Washington Pattern Jury Instructions, pages 117, 385 and 388	7

United States Court of Appeals
For the Ninth Circuit
No. 22000

FRUIT INDUSTRIES RESEARCH FOUNDATION, d/b/a
FOOD INDUSTRIES RESEARCH & ENGINEERING,
Appellant,
vs.
THE NATIONAL CASH REGISTER COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

The argument in appellee's brief, like the trial court's decision, might perhaps be appropriate, even though unsound, if this were a nonjury trial of an equity suit for rescission, or as an argument to the jury. But the same overlooks entirely the important undisputed fact that *this was a trial by jury*. If there was substantial evidence making a prima-facie case for the plaintiff—and here there undoubtedly was—the plaintiff-appellant cannot be lawfully deprived of its right to jury trial under both the Federal and State Constitutions.

None of the cases cited by appellee involves a situa-

tion such as we have in the instant case, namely the problem of whether the case should have been submitted to the jury. *Practically all of them were trials without a jury.* Consequently, they have no application whatever to the issues involved in this appeal.

The trial court made this same error in deciding it as though it were a nonjury case (R. 586-8).

ISSUE A

Appellee incorrectly asserts (p. 3) that Phillip Flu-aitt was "the principal officer of the appellant" as to these transactions. Although, as office manager, he was the first one contacted by Rasmussen, actually Earl W. Carlsen, the president and managing director, and D. Loyd Hunter, the secretary and chief engineer, they being the two principal stockholders, directors and officers of the appellant, were the principal officers with whom Rasmussen dealt. It is undisputed that Carlsen, as head of the company, made the final decision to purchase (R. 384, 393-4).

It is also well to bear in mind what we are *not* claiming. During these sale negotiations Rasmussen prepared and delivered to appellant certain typewritten documents showing that appellant with this machine would have net profits in its data processing department of more than \$8,000.00 per annum (Ptf. Ex. 1). These, of course, have a material bearing as corroborating the oral testimony as to his misrepresentations. However, we are not claiming and have never claimed that Rasmussen made a definite "guarantee" that ap-

pellant through the use of this equipment would realize profits in any definite stated amount. Nor are we claiming that Rasmussen made definite misrepresentations as to the specific defects of this equipment, aside from his assurances that its relatively slow print-out rate was not important and had no practical significance. We proved the existence of those defects in order to prove the falsity of his representations and the reasons for such falsity. The misrepresentation was that this equipment was in all respects suitable, adequate and appropriate for service bureau data processing and computer work. This representation was false because as stated on page 7 of our opening brief: (1) the in-put reading rate was too slow; (2) the print-out rate was too slow (only one letter like a fast typewriter, or twelve numerical digits at a time); (3) it was inadequate for doing alphabetical work, which was essential for that purpose; and (4) the memory core, consisting of only 200 cells, was wholly inadequate for such purpose.

Consequently when appellee makes the fallacious contention (p. 3-5, 14-18) that it should prevail and that appellant was not entitled to have the case submitted to the jury because of a witness's admission that there was no specific "guarantee" of profits in any definite amount and that there was not a specific misrepresentation as to the definite defects in the equipment, obviously appellee is completely missing the point

of this litigation. Those admissions clearly have no material bearing whatever on this appeal.

Moreover denial by Rasmussen (Br. p. 5, 10) of portions of our testimony is immaterial on these issues, but on the contrary substantiates our position that these were to a great extent *disputed issues of fact* on which reasonable minds might differ, and which consequently should have been submitted to the jury for determination.

Fluaitt testified that in the demonstration of the machine at appellee's headquarters at Dayton, Ohio, there was on one occasion a temporary breakdown of the machine, but certainly this does not establish, as appellee claims (p. 4) that appellant purchased the machine with knowledge of the falsity of the representations.

As pointed out on page 8 of our opening brief, the evidence establishes that this NCR 390 equipment is not used anywhere by any service bureau. Rasmussen did not dispute this.

Appellee correctly concedes (p. 12), as did the trial court (R. 507), that "this is a diversity case and that the law of Washington governs". However appellee then states that it was the province of the trial court to determine whether appellant's case was established by clear, cogent and convincing evidence or inference therefrom. But the law of Washington is directly to the contrary. It is well settled that where substantial evidence is introduced, it is the *function of the jury* and

not the judge to *weigh the evidence* and determine whether the required degree of proof has been introduced.

“The jury is *the sole judge* of the credibility and *weight of the evidence*.” *Arthurs v. National Postal Transport Ass’n*, 49 Wn. 2d 570, 304 P. 2d 685; *Colagrossi v. Hendrickson*, 50 Wn. 2d 266, 310 P. 2d 1072. (All italics herein are ours.)

State v. Zorich, 72 W. D. 2d 31, 431 P. 2d 584 (1967) was a criminal prosecution for grand larceny committed by fraudulent representations. In criminal cases, of course, the plaintiff must establish guilt by proof beyond a reasonable doubt—a much higher degree of proof than in a civil fraud action. Nevertheless, the Washington Supreme Court in affirming the conviction held that even in such a case “substantial evidence” was sufficient to require submission of the case to the jury, saying:

“In our consideration of this contention, we are guided by the decisions of this court that *the jury is the sole and exclusive judge of the evidence and the weight* and credibility of the witnesses, and that *this court will not reverse if there is substantial evidence to support the jury’s findings*. *State v. Mickens*, 61 Wn. 2d 83, 377 P. 2d 240 (1962) . . . However, *the false representations need not be the sole means of inducing the defrauded person to part with his money, but it is sufficient if such representation was believed and relied upon by such person and in some measure operated to induce him to part with his property*. *State v. Cooke*, 59 Wn. 2d 804, 371 P. 2d 39 (1962); *State v. Peterson*, 190 Wash. 668, 70 P. 2d 306 (1937).”

The court therein concluded:

“Reasonable minds could draw different conclusions from the evidence. hence this question became one for the jury to resolve.

“Investigations on the part of a victim are facts relevant to the issue of reliance in a criminal case of larceny by false representations. Reliance is a factual question for the determination of the jury. In the present case, Standard Discount’s investigations were not conclusive on the issue of reliance, but were facts for the jury to weigh in determining such issue.”

In *State v. Jackson*, 72 W. D. 2d 49, 431 P. 2d 615, a criminal kidnaping case, in affirming the conviction, the Washington court said:

“In reviewing a criminal conviction, we do not say that a court of appeals is completely devoid of power to examine the record and ascertain therefrom if the evidence in sum proves a crime and that the defendant committed it. There must be some small interstice left for the intervention of appellate jurisdiction where, despite a verdict of conviction, the whole record does not prove a crime or defendant guilty. But, notwithstanding this reservation of appellate power, the verdict of the jury *remains paramount. Where there is substantial evidence to prove a crime and the defendant’s commission of it, the jury is the sole and exclusive judge of the evidence and its verdict is conclusive as to the facts.* *State v. Davis*, 53 Wn. 2d 387, 333 P. 2d 1089 (1959).”

That being the law in Washington in criminal cases where guilt must be proved beyond a reasonable doubt, manifestly the same rule applies and the weight of the evidence is for the jury in a civil fraud case. See the authorities cited in our opening brief.

Proof beyond a reasonable doubt, required in crimi-

nal cases, is not necessary in civil fraud actions. See *Bland v. Mentor*, 63 Wn. 2d 150, 385 P. 2d 727, quoted on page 30 of our opening brief. See also pages 117, 385 and 388 of Washington Pattern Jury Instructions (Vol. 6 Washington Practice, published by West Publishing Co.)

Moreover in any event, as pointed out in our opening brief, here there was proof of fraud by clear, cogent and convincing evidence.

Appellee rightly concedes (p. 14) that through Rasmussen it did make the representation to appellant during these sale negotiations that this machine was suitable and adequate for service bureau work and was sold for that purpose. Likewise the trial court in his decision found that this representation was made and that it was false (R. 508-514, 520).

Rummer v. Throop, 38 Wn. 2d 624, 231 P. 2d 313, and other Washington cases cited at pages 19 to 31 of our opening brief clearly go much further than appellee contends (p. 27). They do not merely hold that dissuasion from further inquiry by one who has a suspicion is actionable. The law of Washington is definitely established and well settled by these authorities that where a prospective purchaser has partial knowledge of certain defects of the property, but he is assured by the seller, who has superior knowledge, that such defects have no practical significance, importance or effect, the seller's misrepresentations are actionable. This principle is clearly determinative of this appeal.

As this court held in *Continental Casualty Co. v. Thompson*, 369 F. 2d 157, a diversity case, its decision was controlled by a Washington case which was "squarely in point," and the plaintiff was held entitled to recover. The same is true here based on numerous Washington cases which are squarely in point.

Clearly in the cases we cited there was more than a mere suspicion. For example, Miraldi actually saw the alkali on the surface of the ranch. Rummer actually saw the large magnesium plant adjacent to the ranch and was informed and warned by a relative as to its detrimental effects. Nevertheless each of them recovered for fraudulent misrepresentations.

Appellee contends (p. 28) that these parties had "equal knowledge" concerning this highly complicated equipment. Manifestly that is not correct, and the whole foundation of appellee's argument fails. The record citations on page 6 of our opening brief clearly establish that appellant's officers had little or no previous knowledge as to this NCR 390 equipment. On the other hand the same was manufactured and sold by appellee, and its representatives should have had and actually had full knowledge with reference to its capacities or lack of capacities.

Appellee states (p. 29) we failed to show reliance upon its misrepresentations. Such reliance, however, is clearly established by the positive testimony of each of appellant's three officers cited on page 6 of our opening brief.

Appellee is not relying upon any case tried with a jury. Appellee principally relies upon two cases, *Puget Sound National Bank v. McMahon*, 53 Wn. 2d 51, 330 P. 2d 559 (p. 29), and *Shook v. Scott*, 56 Wn. 2d 351, 353 P. 2d 431 (p. 32). However one of the conclusive distinctions is that (except for an "advisory jury" in *Shook*, which is actually meaningless and is not controlling) each of these cases was an equity suit for rescission of a purchase contract and consequently was tried by the court *without a jury*.

It is well settled that there is no right of jury trial in an equity suit for rescission. *Vickerman v. Kapp*, 167 Wash. 464, 9 P. 2d 793; *Main v. Western Loan & Building Co.* 167 Wash. 1, 8 P. 2d 281.

Moreover each of these cases is clearly distinguishable on its facts. In *Puget* it was obvious to the purchaser, who was extremely experienced and skillful in dealing with similar properties, that the building in question was apparently so old and dilapidated that the seller's representations could not possibly be true. There were no reassurances by the seller such as would make applicable the *Rummer* principle relied upon by us. The case clearly has no application to the instant case.

Shook, an equity suit for rescission, was a border-line five-to-four decision. There was no misrepresentation as to the capacity of the well to produce sufficient irrigation water. The defendant seller always had sufficient water. The plaintiff purchaser of the ranch in-

stalled an irrigation sprinkler system, and he had sufficient irrigation water the first year. Thereafter, a third party who had in the meantime purchased the well wrongfully shut off plaintiff's irrigation water. The majority of the court distinguished several Washington cases where there was a misrepresentation as to the adequacy of the water supply, and held that plaintiff had no right to rescind his contract in equity because whether sufficient water would be made available to him in the future depended upon the known terms of the contract with a third party and its future performance by the latter. The *Shook* case was distinguished by the trial court in his decision (R. 518-522). In so doing he ably pointed out:

“Here, the adequacy of this machine to handle Birdseye's account *didn't depend upon any future act. It was adequate at the time he made the representation or it wasn't.*” (R. 519)

This case comes squarely within the following statement in the *Shook* majority opinion:

“On the other hand, a statement is one of existing fact if a quality is asserted which inheres in the article or thing about which the representation is made so that, at the time the representation is made, the quality may be said to exist independently of future acts or performances of the one making the representation, independently of other particular occurrences in the future, and independently of particular future uses or future requirements of the buyer. In *Nyquist v. Foster*, *supra*, we held that a statement by a dealer to a prospective buyer of an automobile trailer that its sidewalls would not warp, related to a then existing condition which inhered in the material at the time the statement

was made, and it was therefore a representation of existing fact upon which fraud might be predicated."

See also *Nyquist v. Foster*, 44 Wn. 2d 465, 268 P. 2d 442, therein cited, and *Holland Furnace Co. v. Korth*, 43 Wn. 2d 618, 262 P. 2d 772, 41 A.L.R. 2d 1166, and the cases therein cited, which strongly support our position herein. See also the *Shook* dissenting opinion of four judges and the authorities therein cited.

In *A.B.C. Packard, Inc. v. General Motors Corp.*, 275 F. 2d 63, there was a judgment based upon a *verdict of the jury* in favor of the defendant, and the court held that the case was properly submitted to the jury. Actually therefore it is an authority which supports our position.

Asheim v. Pigeon Hole Parking, Inc., 283 F. 2d 288, (1) was a case tried *without a jury* and (2) was based on a letter from defendant's patent attorney stating his *legal opinion* as to the validity and scope of a patent. For both of those reasons the case is clearly distinguishable.

All of the Washington cases cited by appellee (p. 30) were tried *without a jury*; and in each of them the trial court as the trier of the facts disbelieved the plaintiff's testimony.

Fluaitt's partial knowledge as to the print-out rate in any event would not be imputed to appellant because such knowledge was *not* acquired in the course of his employment. Consequently the cases cited by appellee

on ages 18 and 29 are clearly distinguishable. As stated in 3 C.J.S. 197, sec. 264:

"A principal is not affected with knowledge which the agent acquires while not acting in the course of his employment."

See also to the same effect: *Citizen's Casualty Co. v. Jones* (10 Cir.) 238 F. 2d 369, cert. denied, 352 U. S. 103; *Schram v. Burt*, (6 Cir.) 111 F. 2d 557; *Higgins v. Shenango Pottery Co.*, (3 Cir.) 256 F. 2d 504; *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 10 A.L.R. 662.

As stated in *Rocky Mountain Fire & Casualty Co. v. Rose*, 62 Wn. 2d 896, 385 P. 2d 45:

"The knowledge which an agent acquires while acting as such and within the scope of his authority is imputed to his principal."

The trial court therefore clearly erred in dismissing and refusing to submit the case to the jury as to Issue (A).

ISSUE (B)

Most of the foregoing argument is also directly applicable to this issue and need not be repeated here.

Appellant's evidence established that Rasmussen, as an inducement for the purchase, repeatedly and definitely represented and promised to appellant's representatives that appellee, through its sales staff of 27 men in the area, would procure sufficient customers and patronage for appellant so that it could operate a successful service bureau business using this equipment, and that it would not be necessary for appellant to

have any sales staff of its own for this purpose.

The facts (1) that he made such a representation and (2) that the same was made with no intention of performing the same were clearly proven by the evidence, as shown in our opening brief, and were manifestly questions of fact for determination by the jury.

None of the cases cited by appellee (p. 35) involved this legal principle upon which we rely. As shown on page 35 of our opening brief the Washington Supreme Court has repeatedly referred to this as "*an exception as well established as the rule itself.*" Consequently it seems absurd for appellee to cite cases where neither the plaintiff nor the court relied upon this well settled exception. For example, in the case principally relied upon by appellee, *Shook v. Scott*, 56 Wn. 2d 351, 353 P. 2d 431, *supra*, the court said:

"If the guaranty was construed as a promise on the part of the seller to furnish irrigation water, the court said, it could not be the basis of an action of fraud *unless there was proof that it was made with no intention of keeping it. (There is in this case no contention that the fraud of the defendant was in making a promise which he had no intention of keeping.) . . .*

"Also, in *Mid-Continent Life Ins. Co. v. Pendleton*, (Tex. Civ. App.) 202 S.W. 769, a representation made by a seller of land that water would be on the land in sixty days was held non-actionable *in the absence of an allegation and proof that the "promise" was made with the fraudulent intent of not keeping it.*"

This legal principle *was not* relied upon in *Shook* or

any of the other cases cited by appellee. *It is* definitely the basis of our contention herein as to this issue.

Schlaadt v. Zimmerman, 206 F. 2d 782, was tried *without a jury*, being an action in equity for specific performance, and the court dismissed the action on the ground of the statute of frauds. This legal principle was not mentioned, and the case clearly has no application here.

CONCLUSION

We therefore respectfully submit that as to both issues (A) and (B) hereinabove mentioned appellant established a sufficient *prima facie* case, and the court erred in discharging the jury and dismissing the action as a matter of law.

Respectfully submitted,
ELWOOD HUTCHESON
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

ELWOOD HUTCHESON
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON KEITH GRAVES and
THEODORA GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

HAROLD J. GRAVES and BEULAH
F. GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

FILED

OCT 9 1967

WM. B. LUCK, CLERK

APPELLANTS' BRIEF

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON
William H. Kinsey
Stephen B. Hill
12th Floor Standard Plaza
Portland, Oregon 97204

Attorneys for Appellants

	Page
Table of Cases and Authorities.....	11
Statement of Jurisdiction.....	1
Statement of the Case.....	2
Specification of Error.....	16
Summary of Argument.....	17
Argument.....	21
I. The Tax Court erred in failing to properly apply the doctrine of <u>Massey Motors vs. United States</u> that economic useful life is measured by use in the taxpayer's particular business, not by the full abstract economic life of the asset in any business, or by reference to similar types or class of assets. As a result of such failure, the Tax Court rejected Plaintiff's definition of economic useful life and disregarded the testimony of Petitioners' expert witness based thereon.....	21
II. The Tax Court erred in accepting the testimony of the Commissioner's expert witness as the basis for the Court's findings concerning economic useful life.....	28
III. The Tax Court erred in failing to admit evidence establishing a fair market value for the Chicago Buildings below their depreciated basis on a date subsequent to the years at issue.....	31
IV. The Tax Court erred in failing to hold that subsection 3.05, part II of Revenue Procedure 62-21 precludes the Commissioner from making the depreciation adjustments for the subject years.....	33
Conclusion.....	35
Certificate.....	36
Appendix.....	37

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	Page
Fribourg Navigation Co., Inc. v. Commissioner, 383 U.S. 272 (1966).....	19, 31
Heart of Atlanta Motel, Inc. v. United States, 63-1 USTC para. (N.D. Ga. 1963).....	23
Massey Motors v. United States, 364 U.S. 92 (1960).....	3, 17, 21, 22, 24, 25, 26, 29, 31, 32
United States v. Ludey, 274 U.S. 295 (1927).....	24
United States v. S&A Company, 338 F.2d 629 (8th Cir. 1964).....	24
<u>Other</u>	
Revenue Procedure 62-21, 1962-2 Cum. Bull. 418.....	3, 11, 15, 20, 33, 35

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON KEITH GRAVES and
THEODORA GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

HAROLD J. GRAVES and BEULAH
F. GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

APPELLANTS' BRIEF

Appeal from the Tax Court of the United States

STATEMENT OF JURISDICTION

This is an appeal from a decision of the Tax Court of the United States affirming Federal income tax decisions asserted against Petitioners by the Commissioner of Internal Revenue in the below specified amounts for the indicated taxable years resulting entirely from decreases in depreciation deductions on certain property;

	<u>Year</u>	<u>Deficiency</u>
	1958	\$9,182.17
Harold J. Graves and	1961	247.50
Beulah F. Graves	1962	1,062.43
	1963	4,070.59
	1960	1,063.01
Vernon Keith Graves	1961	2,188.27
and Theodora Graves	1962	661.20
	1963	2,218.81

Appellate jurisdiction and venue are granted this court by 26 U.S.C.A., Sec. 7482(a) and 7482(b)(1). The Tax Court had jurisdiction by virtue of 26 U.S.C.A., Sec. 7442. The case of Vernon Keith Graves and Theodora Graves v. Commissioner was consolidated with Harold J. Graves and Beulah F. Graves v. Commissioner in the Tax Court proceedings, and the cases have likewise been consolidated upon this appeal.

STATEMENT OF THE CASE

Petitioners Vernon Keith Graves and Theodora Graves and Petitioners Harold J. Graves and Beulah F. Graves are all residents of Oregon, and hereinafter are collectively referred to as "Petitioners".

Differing from the ordinary depreciation case which primarily involves questions of fact, the following points of first impression are here presented:

Proper application of the "particular business" doctrine of Massey Motors vs. United States, 364 U.S. 92 (1960) to economic useful life of buildings held by an investor for monetary return through leasing.

What constitutes evidence that a depreciation deduction was examined for purposes of Revenue Procedure 62-21, 1962-2 Cum. Bull 418, Subsection 3.05, Part II.

The transcript of the record consists of two volumes. Volume I which includes the stipulation of the parties and the Tax Court findings of fact and opinion is hereinafter referred to as "R". Volume II which contains the report of the proceedings before the Tax Court is hereinafter referred to as "Tr".

Identification of Property

The two buildings in controversy are located on adjoining parcels of real property in Chicago, Illinois. The parcels of real property with the buildings thereon are hereinafter collectively referred to as the "Chicago Property", and the two buildings independent from the real property are hereinafter referred to as the "Chicago Buildings". On and after September 1, 1959, Petitioners owned the following undivided percentage interests

In the Chicago Property:

Harold J. Graves	36.90%
Beulah F. Graves	36.90%
Vernon Keith Graves	10.81%
Theodora J. Graves	.62%

The remaining interests in the Chicago Property are owned by Robert Graves (10.81%, Juanita M. Graves (.62%), and Rex Graves (3.34%), hereinafter collectively referred to as the "other owners". (R. 33, Stip. para 4)

Acquisition and Use of Property
by Petitioners

Petitioners and the other owners acquired the Chicago Property on September 1, 1959 from Sawyers, Inc. in a stock redemption. The Chicago Property was considered to have a fair market value of \$592,057.67 on September 1, 1959, the same as Sawyers, Inc. book value. In return for the Chicago Property, Petitioners and the other owners surrendered Sawyers, Inc. capital stock having a value of \$592.057.67, plus additional Sawyers, Inc. stock for cash. (R. 35, Stip. para 7)

After acquisition on September 1, 1959, Petitioners leased the Chicago Property back to Sawyers, Inc. under a written lease for a five-year term commencing September 1, 1959 and ending August 31, 1964, at a monthly rental of \$3,000. The lease contained a renewal option which Sawyers, Inc. exercised, thereby extending the lease for the five-year period commencing September 1, 1964 and ending August 31, 1969, at a monthly rental of \$3,750. (R. 36, Stip. para 9) Under instrument dated

December 28, 1964, for a \$15,000 consideration, Petitioners and the other owners granted Sawyers, Inc. an option to lease the Chicago Property for another term of five years commencing September 1, 1969 through August 31, 1974 at an annual rental of \$45,000 (R. 36, Stip. para 11). Such option was granted, rather than extending the lease, because Sawyers, Inc. did not want to become obligated through August 31, 1974 (Tr. 56). At the time of the Tax Court hearing on June 30, 1966, Harold Graves had no assurance or expectation that the option would be exercised. (Tr. 56).

Petitioners did nothing with the Chicago Property except lease it as above related.

History of Property Prior to Acquisition by Petitioners

Sawyers, Inc., from which Petitioners acquired the Chicago Property, was a manufacturer of stereoscopic slides, viewers, and other photographic equipment, with home office and manufacturing complex at Progress, Oregon (R. 36, Stip. para 10). In 1951 Sawyers, Inc. purchased one parcel of the Chicago Property (known as 3500 N. Koster Avenue) and constructed the ground floor structure in 1952, adding a second floor during 1954 (R. 34, Stip. para 5). The other parcel of the Chicago Property (known as 3512 N. Koster Avenue), purchased by Sawyers, Inc. from Bell & Howell Corporation on November 28, 1958, included a two story structure constructed in 1952 (R. 34, Stip. para 6).

Sawyers, Inc. used the Chicago Property as a distribution

center, sales office, and for research and development (R. 35, Stip. para 9).

Sawyers, Inc. employed a useful life of 40 years commencing October 1, 1952 for the 3500 N. Koster ground floor, a useful life of 38 years commencing October 1, 1954 for the 3500 N. Koster second floor and a useful life of 34 years commencing January 1, 1959 for 3512 N. Koster (Tr. 64). At the time of the transfer to Petitioners on September 1, 1959, the Chicago Buildings had the following remaining useful lives to Sawyers, Inc.:

	<u>Remaining Economic Useful Life</u>
3500 N. Koster, ground floor	33 years
3500 N. Koster, second floor	33 years
3512 N. Koster	33 years

Harold Graves was president and a member of the board of directors of Sawyers, Inc. from about 1931 to 1957 and was the chairman of the board of directors from 1957 to 1959 (Tr. 57).

Economic Useful Life Used by
Petitioners, and Redetermination
Thereof by Commissioner

For Federal income tax purposes commencing September 1, 1959, Petitioners used an economic useful life of 25 years for the Chicago Buildings, and 5 years for the heating, lighting and plumbing components. Revenue Agents examined the 1959, 1960 and 1961 Federal income tax returns of Harold and Beulah Graves. Based on these examinations, refunds were granted the Graves, and no reductions in depreciation on the Chicago Buildings were proposed (R. 37, Stip. para 13, 14). The 1962 and 1963 income tax returns of Harold and Beulah Graves were examined by a

third Revenue agent who also examined the 1961 return. As a result of such examination, statutory notices were issued determining a 45 year useful life for the Chicago Buildings and a 25 year useful life for the heating, plumbing and electrical components.

Expert Testimony at
Tax Court Hearing

Mr. H. O. Walther testified as Petitioners' expert witness on economic useful life. Mr. Walther is a real estate appraiser and consultant, and has a bachelor degree from the University of Wisconsin with a major in finance, and a master's degree from Northwestern University with land economics as a major. He has been in the real estate financing, appraising and consulting business since 1923. The last 40 years of his experience has been in the Chicago, Illinois area. He is active in appraisal organizations like the American Institute of Real Estate Appraisers, the Society of Real Estate Appraisers, and has been national president of each of these organizations. (Tr. 34 - 35).

Mr. Lawrence N. Kenney testified as the Commissioner's expert witness on useful life. Mr. Kenney is an evaluation engineer with the Internal Revenue Service and served as a consultant in the Revenue Service in the Chicago area in matters pertaining to engineering issues. He had no economic background in regard to real property. All of his background was engineering. (Tr. 67 - 69).

Mr. Walther and Mr. Kenney agreed on the following: The Chicago Buildings are sound, concrete construction in good

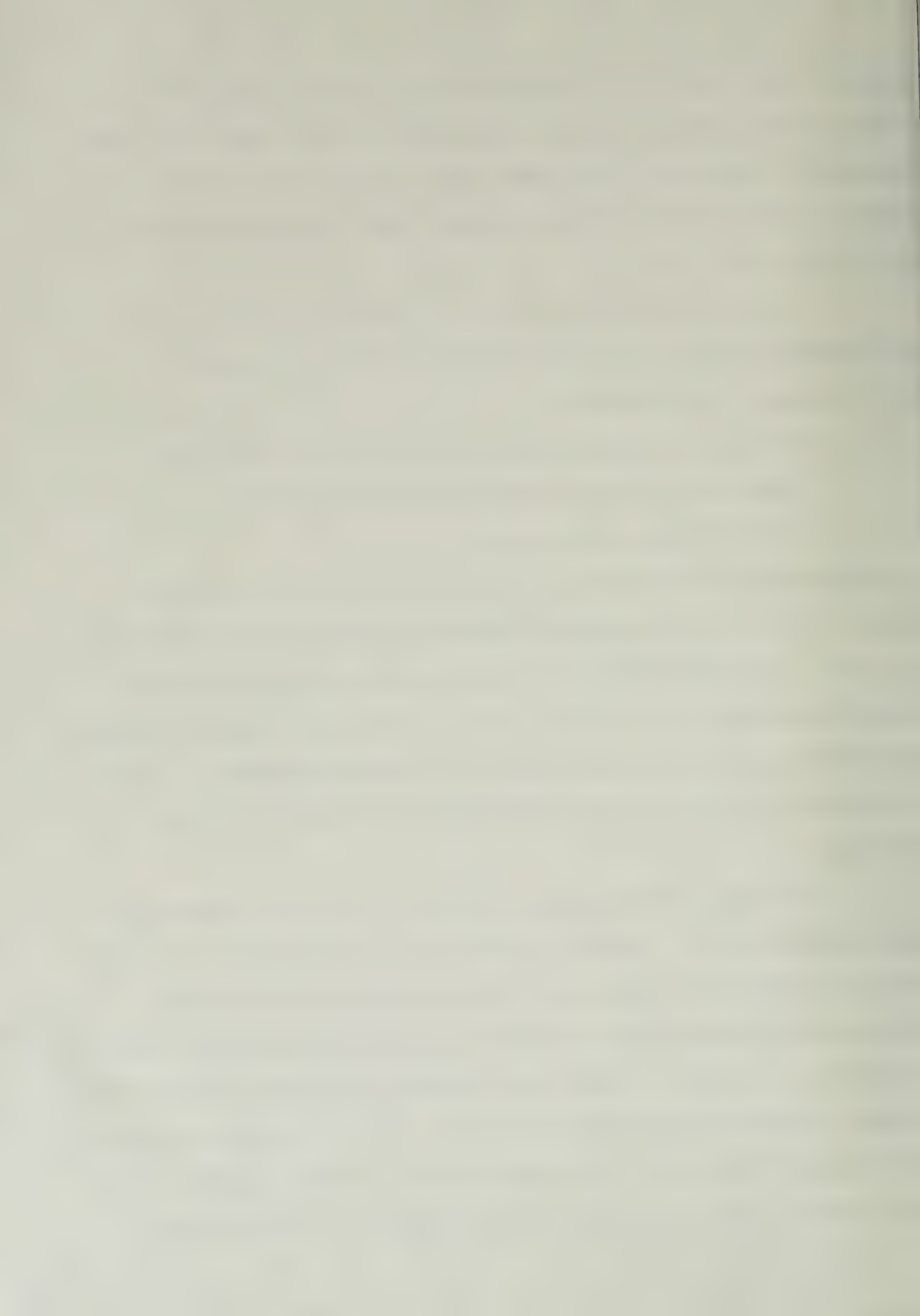
condition (Tr. 76, 86). The location of the buildings for commercial and light industrial purposes is excellent from the viewpoint of accessibility (both public transportation and freeway), availability of labor force, and zoning protection (Tr. 80 - 81, 85 - 86).

The following definition of economic useful life constituted the basis for the conclusions of Petitioners' expert witness, Mr. Walther:

How long it takes before the return on the land plus the building would be no more than the return on the land alone.

The definition attributed to Mr. Walther in the Tax Court's opinion (R. 65) is the garbled statement appearing at the bottom of Tr. 86. The definition as phrased above reflects the reiterated statement at Tr. 87. Based on this definition, Walther concluded that the economic useful life from September 1, 1959 was 25 years for the Chicago Buildings and 8 years for the components.

In order to determine economic useful life under the above definition, Mr. Walther stated that a knowledge of market reaction, demand and supply and the adequacy of the present building and surroundings and what it takes to handle the demand and supply. (Tr. 87). Under Mr. Walther's approach, the economic aspects of the Chicago Buildings rather than the physical aspects were dominant (Tr. 86). According to Mr. Walther, useful life in the strict sense had little to do with his determination



(Tr. 87). By useful life in the strict sense, Mr. Walther meant a use not involving the necessities for a monetary return (Tr. 87 - 88).

Quoted below is a key portion of Mr. Walther's testimony made in response to the Court's inquiry concerning Mr. Walther's statement that the Chicago Buildings had "a great deal of obsolescence" (Tr. 46):

"THE WITNESS: First of all, it is a two-story building without an elevator. Therefore, there are only certain types of users who can use this building. It has no sprinkler system in it, it has loading docks which are not the level of the trucks and it has low ceiling heights, it has 12 feet at maximum and if you built a warehouse building today, a one story, the minimum seems to be fourteen and sixteen and they are going as high as thirty because they have no lift trucks which can lift material up much higher. It is because of this built-in obsolescence that that building has a remaining useful life shorter than, for example, a one-story building with a 16-foot ceiling. And as the labor costs go up, they become more and more obsolescent because the labor of moving goods vertically as against moving goods horizontally becomes high and, therefore, the obsolescence in this building makes a shorter remaining useful economic life."

Because of the built-in obsolescence, Mr. Walther emphatically disagreed with the Commissioner's witness that the Chicago Buildings were the highest and best use of the particular land. Mr. Walther defined highest and best use as that use which over the foreseeable future will yield the greatest net return (Tr. 86).

Mr. Kenney, the Petitioners' expert witness, concluded that the useful life from September 1, 1959 was 38 years for the Chicago Buildings and 28 years for the components. Mr.

Kenney did not specify the definition of useful life upon which he based his conclusion. Except for testimony concerning the physical condition of the Chicago Buildings, Mr. Kenney's testimony referred to buildings generally in the area, not the Chicago Buildings in particular. For example, in response to a question concerning the general demand for buildings and rental space, Mr. Kenney replied that: "Buildings of this type, one and two-story structures, are in great demand at all places throughout Chicago, particularly in this area . . ." (Tr. 80 - 81). Similarly, when questioned concerning the present and potential use of the buildings, Mr. Kenney's only reply was that the location is excellent (Tr. 81).

Mr. Kenney testified that the Chicago Buildings represent the highest and best use of the land under his definition of highest and best use: "Best use of that land is to have an industrial building on it." (Tr. 83).

Court Rejected Petitioners' Tender of Appraisal

For reasons not connected with the tax controversy, Mr. Walther made an appraisal of the Chicago Property and Buildings at November 3, 1964 (Tr. 36, 38). In attempting to have this appraisal introduced in evidence, counsel for Petitioners informed the Tax Court that the appraisal established a fair market value for the Chicago Buildings below Petitioners' basis for same (Tr. 38). As explained to the Tax Court, it

is Petitioners' theory that, absent a downward fluctuation in property value, establishment of a fair market value below depreciated basis constitutes evidence that prior depreciation could not have been excessive (Tr. 38, 40) and that the economic useful lives determined by Petitioners were reasonable. The Tax Court rejected introduction of the appraisal for such purpose.

Facts Pertinent to Revenue
Procedure 62-21 Issue

Subsection 3.05, Part II, Revenue Procedure 62-21, 1962-2 Cum. Bull. at 433 precludes the Commissioner from disturbing a depreciation deduction when an audit report ". . . contains comments that the depreciation was examined but not adjusted, or where other specific evidence indicates that the depreciation deduction was examined."

Set forth on the next page is a xerox copy of the rental income and depreciation schedule for the Chicago Buildings which was attached to the 1960 income tax return of Harold and Beulah Graves (and the other Petitioners). An identical schedule was attached to the 1961 returns. As shown on the schedule, Harold and Beulah Graves' share of the Chicago Building loss after depreciation totaled \$2,499.98 (\$1,249.99 each). In the 1960 income tax return of Harold and Beulah Graves, the \$2,499.98 Chicago Building loss was added to a \$237.10 property inspection expense, and the \$2,737.08 total was carried over to the printed part of the return entitled "Income from Rents and Royalties." In the Graves' 1961 return, the \$2,499.98 Chicago Building loss was carried directly to the printed part of the return entitled "Rent and Royalty."

Rental Income Schedule - Chicago Buildings, 1960

Depreciation Schedule

	Date Acquired	Cost	Prior Deprn.	Remaining Cost	Life		Deprn. This Year
					Est.	Rem.	
ding	9-1-59	\$284,648.34	\$ 3,795.31	\$280,853.03	25	24 2/3	\$11,385.93
., plbg.	"	51,159.50	3,410.63	47,748.87	5	4 2/3	10,231.89
ding	"	91,651.82	1,222.00	90,429.82	25	24 2/3	3,666.00
., plbg.	"	39,508.66	2,634.00	36,874.66	5	4 2/3	7,902.00
addition	"	65,566.89	874.23	64,692.66	25	24 2/3	2,622.69
., plbg.	"	17,899.08	1,193.00	16,706.08	5	4 2/3	3,579.00
		<u>\$550,434.29</u>	<u>\$13,129.17</u>	<u>\$537,305.12</u>			<u>\$39,387.51</u>

Total rent received	\$36,000.00
Less - depreciation	<u>39,387.51</u>
Net loss	<u><u>\$ (3,387.51)</u></u>

Allocation of net loss:

Harold J. Graves	36.9 %	\$ (1,249.99)
Beulah F. Graves	36.9 %	(1,249.99)
Vernon Keith Graves	11.43%	(387.19)
Robert Graves	11.43%	(387.19)
Rex Graves	3.34%	(113.15)
Total	<u>100.00%</u>	<u><u>\$ (3,387.51)</u></u>

Revenue Agent P. M. Andrews issued an audit report dated June 18, 1962 (Exhibit 5-A) covering 1959 and 1960 (also the loss carryback year 1957) which report was forwarded to Harold and Beulah Graves under letter dated July 5, 1962 (R. 37, Stip. para 14). Revenue Agent Conrad S. Miller issued an audit report (Exhibit 7-G) covering 1961 (also the loss carryback year 1958) which report was forwarded to the Graves under letter dated May 24, 1963 (R. 37, Stip. para 15). The covering letters (included as part of Exhibits 5-E and 7-G) state that the enclosed audit reports reflect examinations of the Graves' returns for the specified years.

The audit reports (Exhibits 5-E and 7-G) contain summary schedules for each year showing the items examined and the action taken as a result thereof. Set forth on the next page is a xerox copy extract from the 1960 summary schedule (top half of page) and a xerox copy extract from the 1961 summary schedule (bottom half of page). The \$2,737.08 loss on the 1960 summary schedule opposite "Rents and royalties" is the \$2,499.98 Graves' loss taken from the rental income and depreciation schedule for the Chicago Buildings (copy on page 12) attached to the Graves' 1960 return plus a \$237.10 property inspection expense. The \$2,499.98 on the 1961 summary schedule (bottom half of next page) opposite "Rents and royalties" is the Graves' loss taken from the rental income and depreciation schedule for the Chicago Buildings attached to the Graves' 1961 return.

1965		Year ended 12/31/65		
J. Kenneth P. Graven		1965		
INCOME	RETURN	INCREASE	DECREASE	CORRECTED
salaries, bonuses, commissions compensation.....				
	2,262.25			2,262.25
	1,305.72			1,305.72
annuities				
dividends	(2,727.08)			(2,727.08)
income from business or profession	(13,675.33)			(13,675.33)
income from farming				
income from sale or exchange of capital assets	1,728.22			1,728.22
income from sale or exchange of other assets				
losses				
	100.00			100.00
ADJUSTED GROSS INCOME)	(11,015.22) ✓			(11,015.22)

1966		12/31/66		
J. Kenneth P. Graven		1966		
INCOME	RETURN	INCREASE	DECREASE	CORRECTED
salaries, bonuses, commissions compensation.....				
	3,170.84			3,170.84
	17,202.20			17,202.20
annuities				
dividends	(2,429.98)			(2,429.98)
income from business or profession	(16,264.43)			(16,264.43)
income from farming				
income from sale or exchange of capital assets	2,267.92			2,267.92
income from sale or exchange of other assets				
losses				
Adjusted Gross Income	17,687.34			(17,687.34)

Holding of Tax Court

The Tax Court rejects Petitioners' definition of economic useful life as being a misconception of law (R. 65 - 66), and completely ignores the testimony of Petitioners' expert witness supporting a 25 year useful life for the Chicago Buildings and an 8 year useful life for the components. Adopting the conclusions of the Commissioner's expert witness, the Tax Court held that the Chicago Buildings had a useful life of 38 years and the components had a useful life of 28 years.

The Tax Court denied that Petitioners had brought themselves within Subsection 3.05 Part II of Revenue Procedure 62-21 (R. 63) because (according to the Tax Court) neither the audit report covering 1959 and 1960 nor the audit report covering 1961 contains the slightest comment or any other "specific evidence" that the depreciation deductions on the Chicago Property as shown on the returns of Harold and Beulah Graves were examined (R. 62).

SPECIFICATIONS OF ERROR

Petitioners contend the Tax Court of the United States erred as follows:

1. In failing to properly apply the doctrine of Massey Motors vs. United States that economic useful life is measured by use in the taxpayer's particular business, not by the full abstract economic life of the asset in any business, or by reference to similar types or class of assets. As a result of such failure, the Tax Court rejected Plaintiff's definition of economic useful life and disregarded the testimony of Petitioners' expert witness based thereon.
2. In accepting the testimony of the Commissioner's expert witness as the basis for the Court's findings concerning economic useful life.
3. In failing to admit evidence establishing a fair market value for the Chicago Buildings below their depreciated basis on a date subsequent to the years at issue.
4. In failing to hold that subsection 3.05, part II of Revenue Procedure 62-21 precludes the Commissioner from making the depreciation adjustments for the subject years.

SUMMARY OF ARGUMENT

The Tax Court completely disregarded the testimony of Petitioners' expert witness concerning the economic useful lives of the Chicago Buildings because it was based on what the Tax Court considered an erroneous definition of economic useful life. Petitioners believed the doctrine of Massey Motors vs. United States, 364 U.S. 92 (1960) required that the general definition of economic useful life should be tailored to the leasing business in which Petitioners employed the Chicago Buildings and such tailored definition be used as the basis for the testimony of their expert witness.

Application of the basic depreciation concept in Massey Motors to fit Petitioners' business produced the following restatement of the basic definition: How long can a building leased for a monetary return be expected to function profitably in the leasing business? A building ceases to function profitably in the leasing business when it contributes nothing to the lessor's return so Petitioners employed the following definition of economic useful life as a basis for the testimony of their expert witness:

How long it takes before the return on the land plus the building would be no more than the return on the land alone.

Determination of economic useful life under Petitioners' definition requires a knowledge of market reaction, demand and supply, and highest and best use of the land. The testimony of Petitioners' expert witness emphasized these economic factors. Evidently, emphasis on the economic factors accounts

for the Tax Court's rejection of Petitioners' definition and the testimony based thereon.

The Tax Court saw no difference between criteria to be used in determining economic useful life for a building employed by a taxpayer in his own manufacturing and distributing business on the one hand, and determining economic useful life of buildings held for monetary return through leasing, on the other hand.

Petitioners believe the situations are quite different. In the case of determining economic useful life for buildings used in the taxpayer's own manufacturing and distributing business, physical features have an adverse impact only to the extent they affect the particular use. In contrast, when buildings are held for monetary return through leasing to others, physical defects decrease the number of potential lessees thereby shortening the period of time that the buildings can be expected to function profitably in the leasing business.

Petitioners' expert witness, Mr. Walther, testified that the Chicago Buildings did not represent the highest and best use of the land because of built in obsolescence due to their two-story structure and low ceilings. These features evidently did not adversely affect Sawyers, Inc., but the lease with Sawyers, Inc. will expire August 31, 1969, and thereafter the ability of the buildings to function profitably in Petitioners' leasing business will feel the impact of the obsolescence factors.

If Petitioners are correct in their assertion that economic considerations are paramount in determining the economic useful life of buildings held for monetary return from leasing, the testimony of the Commissioner's expert witness should be accorded little weight. All of his education and background was engineering, with no economic background. The most pertinent portions of Mr. Kenney's testimony were directed to industrial buildings in general, located in the particular Chicago area. This is contrary to the mandate of Massey Motors which expressly states that the economic useful life is based upon the particular asset employed in the particular business, not on the basis of types or classes of assets.

The Tax Court erred in failing to admit an appraisal report made by Mr. Walther which shows a November 3, 1964 fair market value for the Chicago Buildings below Petitioners' depreciated basis for same. Fribourg Navigation Co., Inc. vs. Commissioner, 383 U.S. 272 (1966) recognizes that the establishment of a fair market value above depreciated basis may be some evidence of a miscalculated economic useful life, particularly where there is no appreciation in value to account for same. The reverse should be equally true, - establishment of a fair market value below depreciated basis should be some evidence that the original estimate of economic useful life was not miscalculated.

Two revenue agents reviewed the tax returns of Harold and Beulah Graves and issued audit reports without proposing any depreciation adjustments for the Chicago Buildings.



The returns contained a depreciation schedule clearly setting forth the 25 year lives for the buildings and the 5 year lives for the components. Revenue Procedure 62-21, Subsection 3.05, Part II precludes depreciation adjustments where prior audit reports contain evidence that the depreciation deductions were examined. The facts set forth on pages 11-14 above show that the depreciation deductions were examined thereby invoking the prohibition of Revenue Procedure 62-21.

FIRST SPECIFICATION OF ERROR

The Tax Court erred in failing to properly apply the doctrine of Massey Motors vs. United States that economic useful life is measured by use in the taxpayer's particular business, not by the full abstract economic life of the asset in any business, or by reference to similar types or class of assets. As a result of such failure, the Tax Court rejected Plaintiff's definition of economic useful life and disregarded the testimony of Petitioners' expert witness based thereon.

ARGUMENT

If economic useful life of a building were determined on the basis of types or classes, or upon full abstract economic life, it would make no difference whether a building were used in the taxpayer's own manufacturing and distributing business, or whether the buildings were held for monetary return through leasing. However, as made clear in the following quotations from Massey Motors vs. United States, 364 U.S. 92 (1960), determination of economic useful life is an individualized matter (364 U.S. at 97 and 98):

" . . . the wear and tear to the property must arise from its use *in the business* of the taxpayer--i.e., useful life is measured by the use in a taxpayer's business, not by the full abstract economic life of the asset in any business. . . ."

.....

" . . . the use and employment of the property

in the business relates to the trade or business of the taxpayer--not, as is contended to the type or class of assets subject to depreciation. . ."

Under the doctrine of *Massey Motors*, a generalized definition of economic useful life must be tailored to the particular business before it can furnish guidance for expert testimony. The tailoring, of course, must be premised on a sound basic concept. Petitioners utilized as their premise the basic concept reiterated in the following extract from *Massey Motors vs. United States*, 364 U. S. at 96:

" . . . It was the design of the Congress to permit the taxpayer to recover, tax free, the total cost to him of such capital assets; hence it recognized that this decrease in value--depreciation--was a legitimate tax deduction as business expense. It was the purpose of § 23 (1) and the regulations to make a meaningful allocation of this cost to the tax periods benefited by the use of the asset. In practical life, however, business concerns do not usually know how long an asset will be of profitable use to them or how long it may be utilized until no longer capable of functioning. But, for the most part, such assets are used for their entire economic life, and the depreciation base in such cases has long been recognized as *the number of years the asset is expected to function profitably in use. . .*" (emphasis added)

Petitioners employed the *Chicago Buildings* in the trade or business of leasing. The objective of leasing is production of a monetary return. Application of the basic depreciation concept to fit the particular business produces the following restatement of the above emphasized quotation from *Massey Motors*:
How long can a building leased for monetary return be expected to function profitably in the leasing business? A building ceases to function profitably in the leasing business when the building contributes nothing to the lessor's return.

A building contributes nothing to the lessor's return when the return on the land plus the building is no more than the return on the land alone. The foregoing reasoning led Petitioners to the following individualized definition of economic useful life upon which Petitioners' expert witness based his testimony:

How long it takes before the return on the land plus the building would be no more than the return on the land alone.

Petitioners' definition is more restrictive than required by the Law. A building might return a small amount over and above that which could be obtained from the land alone, but the building nevertheless outlived its usefulness if a substantially greater return could be obtained from a new building after making allowance for the additional rent required to recapture the cost of the new construction. Such would be the case where the location outgrows the building. In Heart of Atlanta Motel, Inc. vs. United States, 63-1 USTC par. 9402 (N.D. Ga.) the court instructed the jury as follows concerning economic useful life:

". . . if you should conclude that at the end of a particular time which you determine the land will have such greater value for other purposes as to make it advantageous to the owners to remove the present improvements, then you would be justified in finding that the useful economic life terminates at that point if you conclude that it is reasonable to predict that within a certain period of time it will be economically or commercially expedient for these properties to be replaced with improvements more in keeping with the value of the land, then you would be justified in selecting that period as a useful economic life." Id. at 88,073-88,074

Under such instructions, improvement in the location will shorten, rather than lengthen the economic useful life. A more accurate

definition of economic useful life for leased property might well be: The number of years until the lessor's financial self interest will dictate replacing the building.

In an effort to avoid controversy, Plaintiffs adopted the restrictive definition above mentioned. It seems irrefutable that a building held by an investor for a monetary return through leasing will have ceased to function profitably in use when the return on the land plus the building is no more than the return on the land alone. Yet, the Tax Court calls this definition "unique" (R. 65), and far afield from recognized concepts (R. 66).

No authority is cited by the Tax Court for its assertions, other than Massey Motors, Inc. vs. Commissioner, supra, and United States vs. Ludey 274 U. S. 295 (1927), a case cited in Massey. As discussed above, Massey Motors is the very case which Petitioners followed in deriving their definition.¹ Perhaps, the key to the Tax Court's reaction is contained in the observation that Plaintiff's definition "seems to involve such things as 'market reaction', 'recapture rates' and the 'highest and best use of a parcel of land.'" (R. 65) Evidently the Tax Court feels any definition of economic useful life which takes such factors into consideration must be wrong. Petitioners, on the other hand, believe that economic factors such as these are paramount in the case of property

¹ In United States vs. S & A Company, 338 F. 2d 629 at 634 (8th Cir. 1964) the court observes that Massey Motors refines the approach of United States vs. Ludey. It is the refinement which Plaintiffs have endeavored to capture in their definition of economic useful life for property held for monetary return from leasing.

held for monetary return through leasing.

Importance of economic factors is not a peculiarity of Plaintiff's definition, but applies equally if the basic concept of Massey Motors is rephrased as follows to reflect the particular business involved:

How long can a building leased for monetary return be expected to function profitably in the leasing business?

Whether a building represents the "highest and best use of the land" has a material bearing upon how long the building will function profitably. Certainly, a building constituting the highest and best use of the land can be expected to function profitably longer than a building having built in obsolescence as did the Chicago Buildings.

Petitioners' expert witness, H. O. Walther, testified that the Chicago Buildings had considerable built in obsolescence due to their two story structure and the low ceiling heights (testimony quoted at page 9 above). The two story type building because of the vertical nature of doing business, is not in the same demand as one story property (Tr. 87). As labor costs go up, two story low ceiling building become more and more obsolescent because the labor of moving goods vertically as against moving goods horizontally becomes high thereby shortening the economic useful life (Tr. 46). Similarly, the size of the bays in the Chicago Buildings reduced the demand over what it would be if the bays were larger (Tr. 88).

As Mr. Walther testified, determination of economic useful life under Petitioners' definition requires a knowledge

of market reaction, demand and supply and the adequacy of the present building and surroundings and what it takes to handle the demand and supply (Tr. 87). This is equally true if the above rephrased basic concept of Massey Motors is used instead of Petitioners' definition. How long a building leased for monetary return can be expected to function profitably in the leasing business certainly is affected by market reaction, demand and supply, not only that resulting from physical characteristics, but also that resulting from outside factors such as availability of other buildings and general market conditions in the leasing field.

A different situation is presented when determining economic useful life for a building used by the taxpayer in his own manufacturing and distributing business. The economic benefit which such a taxpayer derives from the use of his own building is not dependent upon supply and demand for the building. He has satisfied the demand through his own use. Physical features have an adverse effect only to the extent they affect him in his particular use and reduce the probable time he can profitably use the building. If two stories and low ceilings did not affect use of the Chicago Building by Sawyers, Inc. such physical characteristics had no impact upon economic useful life to Sawyers. The situation was changed when Petitioners took over the Chicago Buildings for use in the business of leasing.

Upon acquisition of the Chicago Buildings on September 1, 1959, Petitioners leased the buildings back to Sawyers, Inc. However, Sawyers, Inc. is not obligated under the lease beyond

August 31, 1969. Petitioners would have been willing to extend the lease for a longer period, but Sawyers, Inc. declined to accept the obligation (Tr. 56). Rather, Sawyers, Inc. paid Petitioners \$15,000 for an option to renew the lease for a five year term from September 1, 1969 through August 31, 1974 (R. 36, Stip. para 11). If Sawyers, Inc. knew it wanted the Chicago Buildings through August 31, 1974, it would have executed a firm lease as desired by Petitioners, rather than pay \$15,000 for an option. At the time of the Tax Court hearing on June 30, 1966, Harold Graves had no assurance or expectation that the option would be exercised (Tr. 56). August 31, 1969 termination of the lease is 15 years short of the 25 year economic useful life assigned to the Chicago Buildings by Petitioners. After August 31, 1969, the monetary return receivable by Petitioners will be subject to the economic factors considered by Mr. Walther in giving his opinion.

SECOND SPECIFICATION OF ERROR

The Tax Court erred in accepting the testimony of the Commissioner's expert witness as the basis for the Court's findings concerning economic useful life.

ARGUMENT

If Petitioners are correct in their assertion that economic, not physical, considerations are paramount in determining economic useful life of building held for monetary return from leasing, the testimony of Commissioner's expert witness should be accorded little weight. All of his education and background was engineering, with no economic background in regard to real property (Tr. 67 - 69). This is not to disparage Mr. Kenney. There may be depreciation cases where physical useful life is the dominant consideration. In such cases, Mr. Kenney can offer valuable testimony. Here, there is no issue concerning physical useful life. Likewise there is no controversy concerning the physical characteristics of the buildings. Rather, the question is the economic impact that the physical characteristics have upon the length of time the Chicago Buildings will function profitably in generating a return to Petitioners as lessors. What qualifications does Mr. Kenney have for such a determination?

Actually Mr. Kenney recognized his limitations by giving general answers to the three questions asked him involving economic aspects. In answer to the question concerning his opinion as to the general demand for buildings and rental space as a factor in

determining useful life of Chicago Buildings, Mr. Kenney stated (Tr. 81):

Buildings of this type, one and two story structures, are in great demand at all places throughout Chicago, particularly in this area, service and set up for light manufacturing activities.

As stated in Massey Motors, supra, economic useful life is not determined by reference to type or classes of assets. It is the particular asset with its particular characteristics which controls.

The most pertinent question asked Mr. Kenney was his opinion as to the present and potential use of the buildings as a factor in determining useful lives of the buildings and their components. Mr. Kenney answered as follows (Tr. 81):

"The present location is an excellent position. My opinion is there is none other in Chicago that can rate with it. It is central is [sic] population, it has possibilities and great possibilities for utilization as office space, warehouse space, light manufacturing, particularly electronics and other assembly operations."

Here again Mr. Kenney's testimony concerned buildings in general, limited only to a particular area of Chicago.

Mr. Kenney testified that the highest and best use of the Chicago property was for industrial buildings (Tr. 83). Therefore, concluded Mr. Kenney, the Chicago Buildings represented the highest and best use of the land because they were industrial buildings. Petitioners' expert witness does not quarrel with the proposition that industrial buildings represent the highest and best use of the land. The question, however,

is whether these particular buildings represent the highest and best use. Mr. Kenney's generalized reasoning that the Chicago Buildings were the highest and best use of the land because they were industrial buildings, and the particular location was zoned for industrial, represents the generalized approach to economic useful life condemned in Massey Motors.

THIRD SPECIFICATION OF ERROR

The Tax Court erred in failing to admit evidence establishing a fair market value for the Chicago Buildings below their depreciated basis on a date subsequent to the years at issue.

ARGUMENT

In Fribourg Navigation Co., Inc. vs. Commissioner, 383 U.S. 272 at 277 (1966) the Supreme Court held that sale of an asset for an amount greater than its depreciated basis did not in and of itself prove the taxpayer had miscalculated economic useful life of the asset, particularly where the increased price was due to an unexpected, short-lived but spectacular appreciation in value resulting from a change in the world market. The Supreme Court recognized, however, that such a sale establishing fair market value may constitute some evidence of an erroneously determined economic useful life.

If establishment of a fair market value above depreciated basis is evidence of a miscalculated economic useful life, then establishment of a fair market value below depreciated value should constitute evidence supporting the original determination of economic useful life. At the Tax Court hearing, Petitioners attempted to introduce an appraisal made by Mr. Walther which showed a November 3, 1964 fair market value for the Chicago Buildings below Petitioners' depreciated basis for same. Counsel for Petitioners explained to the Tax Court that the evidence

would negate any reduction in fair market value from September 1, 1959 to the date of the appraisal. With reduction in fair market value eliminated as an explanation, Petitioners could not have taken excessive depreciation through the years at issue because excessive depreciation would have resulted in a depreciated basis below fair market value rather than vice versa. Nevertheless, the Tax Court rejected introduction of the appraisal.

Massey Motors vs. United States, 364 U.S. at 101
contains the following statement:

"...Furthermore, as we have said, Congress intended by the depreciation allowance not to make the taxpayers a profit thereby, but merely to protect them from a loss." (emphasis added)

Since Petitioners are entitled to protection against loss through the depreciation allowance, they should be permitted to show receipt of less than the intended protection as a defense to the Commissioner's assertions of excessive depreciation. The appraisal will make such a showing.

FOURTH SPECIFICATION OF ERROR

The Tax Court erred in failing to hold that subsection 3.05, part II of Revenue Procedure 62-21 precludes the Commissioner from making the depreciation adjustments for the subject years.

ARGUMENT

The purpose and approach of Revenue Procedure 62-21 is capsulized in the second paragraph of Section 1, part II quoted below (1962-2 Cum. Bull. at 429):

" The determination of the useful economic life of an asset is a matter of judgment and estimate. For this reason, it is the policy of the Internal Revenue Service generally not to disturb depreciation deductions. Therefore, adjustments in the depreciation deduction should not be proposed unless there is a clear and convincing basis for a change. The procedures set forth herein are to be followed in determining whether there is a clear and convincing basis for a change. These procedures are designed to provide taxpayers with a greater degree of certainty in determining the amount of their depreciation deductions and to provide greater uniformity in the audit of these deductions by the Internal Revenue Service."(Emphasis added).

Since the professed objective of Revenue Procedure 62-21 is to provide taxpayers with greater certainty, and to provide greater uniformity upon audit, it was natural that the procedure should expressly cover the assertion of depreciation adjustments where there has been a prior audit. Accordingly, Subsection 3.05, part II, 1962-2 Cum. Bull. at 433 supplemented by the answer to question 49, 1962-2 Cum. Bull. at 477 precludes the Commissioner from adjusting depreciation where an audit report contains comments that the depreciation deduction has been examined but not

adjusted, or where other specific evidence indicates that the depreciation deduction was examined. The two audit reports covering returns of Harold and Beulah Graves are identified in the first paragraph on page 13 above. The Tax Court held that neither of these audit reports contains the slightest comment or other specific evidence that the depreciation deductions on the Chicago Property as shown on the returns of Harold and Beulah Graves were examined. (R. 62).

The pertinent facts concerning the Revenue Procedure 62-21 issue are set forth on pages 11 through 14 above. Page 14 is a Xerox copy of the summary schedules contained in the two audit reports. The figures opposite item 5 entitled "Rents and Royalties" on each schedule were taken from the rental income and depreciation schedules for the Chicago Buildings (copy on page 12 above). These figures could not have been placed on the audit report summary sheets unless the rental income and depreciation schedules for the Chicago Buildings had been examined. This rental income and depreciation schedule (page 12 above) clearly specifies 25 year lives for the buildings and 5 year lives for the components. The words "No Change" written on each of the audit report summary schedules (page 14) is a comment that no adjustments were made in the items reflected thereon. One of the items to which the "No Change" comment applies is the loss figure taken from the rental income and the depreciation schedule for the Chicago Buildings which schedule clearly sets forth the depreciation deduction and the economic useful lives employed in deriving same.

A narrow interpretation should not be given "examined" if Revenue Procedure 62-21 is to accomplish its avowed purpose of providing taxpayers with greater certainty. Two different agents reviewed the returns of Harold and Beulah Graves without proposing changes in depreciation. It seems most strange to tell the Graves that the depreciation deductions were not examined.

The returns of Harold and Beulah Graves having been "examined", Revenue Procedure 62-21 precludes alteration of the useful lives utilized by the Petitioners. Thus, regardless of whose expert witness is to be believed or the import of such testimony, the depreciation deduction taken by the Petitioners cannot be disturbed.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the Tax Court and allow Petitioners an annual depreciation deduction for the fiscal years here in dispute computed on the basis of a 25 year useful life for the Chicago Buildings and a 5 year useful life for the components of the Chicago Buildings.

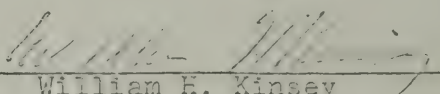
Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON

William H. Kinsey
12th Floor, Standard Plaza
Portland, Oregon 97204
Of attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of The United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



William H. Kinsey

Of Attorneys for Appellants

APPENDIX "A"

Exhibit No.	Identified	Offered	Received
Stipulation and Respondent's Exhibits Nos. 1-A through 24-X	33	33	33
Petitioner's Exhibit No. 25	35	36	-
Petitioner's Exhibits Nos. 26 and 27	49	50	50
Petitioner's Exhibit No. 28	52	52	52
Respondent's Exhibit Y	73	74	74
Respondent's Exhibit Z	74	74	74
Respondent's Exhibit AA	77	77	77

CERTIFICATION OF SERVICE

I, WILLIAM H. KINSEY, attorney for Appellants, hereby certify that I served by mail three true and correct copies of the Appellants' Brief on counsel for the Commissioner of Internal Revenue on the 7th day of October, 1967. I further certify that the copies were placed in a sealed envelope addressed to Mitchell Rogovin, Assistant Attorney General, Department of Justice, Washington, D.C. 20530; said sealed envelope was then deposited in the United States Post Office at Portland, Oregon on the day last mentioned with the postage thereon fully paid.



William H. Kinsey
Of Attorneys for Appellants
1200 Standard Plaza
Portland, Oregon 97204

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON KEITH GRAVES and THEODORA GRAVES,

Petitioners
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

HAROLD J. GRAVES and BEULAH F. GRAVES,

Petitioners
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

FILED

DEC 26 1967

WM. B. LUCK CLERK

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
WILLIAM A. FRIEDLANDER,
ROBERT I. WAXMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

DEC 27 1967

I N D E X

	Page
Opinion below-----	1
Jurisdiction-----	2
Questions presented-----	3
Statutes and Regulations involved-----	3
Statement-----	3
Summary of argument-----	8
Argument:	
I. The factual conclusion of the Tax Court, that the two buildings had useful lives of thirty-eight years and the components therein had useful lives of twenty-eight years, is consistent with well settled principles of law and based upon the relevant record evidence, and is entitled to affirmance on review-----	11
A. Introduction-----	11
B. The court below recognized and applied the legal standards reflected in the pertinent regulations and judicial decisions and was well justified in rejecting the testimony of the taxpayers' expert witness in support of a 25 year useful life-----	14
C. The Tax Court's findings, based upon the entire record, are not clearly erroneous and entitled to affirmance-----	25
1. The Tax Court was correct in deciding that the Commissioner's witness, Mr. Kenney, had the qualifications to render an expert opinion as to the useful lives of the subject properties-----	27
2. The Tax Court properly refused to admit the appraisal report dealing with the fair market value of the Chicago buildings on a date subsequent to the years in issue---	29

II. The Tax Court was correct in concluding that the Commissioner's adjustments of the useful lives of the Chicago properties for depreciation purposes was not precluded by Rev. Proc. 62-21 or any prior revenue ruling-----	31
Conclusion-----	37
Appendix-----	38

CITATIONS

Cases:

<u>Bay Sound Transportation Co. v. United States</u> , decided April 30, 1967 (20 A.F.T.R. 2d 5418)---	25
<u>Bryan, Estate of v. Commissioner</u> , 364 F. 2d 751-	25, 30
<u>Commissioner v. Duberstein</u> , 363 U.S. 278-----	34
<u>Detroit Edison Co. v. Commissioner</u> , 319 U.S. 98-	13
<u>Dinkins v. Commissioner</u> , 378 F. 2d 825-----	25
<u>Fribourg Nav. Co. v. Commissioner</u> , 383 U.S. 272-	16, 30, 31
<u>Graves v. Commissioner</u> , 48 T.C. 7-----	1
<u>Heart of Atlanta Motel, Inc. v. United States</u> , decided March 15, 1963 (63-1 U.S.T.C., par. 9402)-----	15
<u>Massey Motors v. United States</u> , 364 U.S. 92----	9, 12, 13, 14
<u>Southeastern Bldg. Corp. v. Commissioner</u> , 148 F. 2d 879-----	25
<u>Stillwell Manufacturing Co. v. Phelps</u> , 130 U.S. 520-----	28
<u>Turner v. American Security & Trust Co.</u> , 213 U.S. 257-----	28
<u>United States v. Ludey</u> , 274 U.S. 295-----	13
<u>United States v. S & A Co.</u> , 338 F. 2d 629-----	30
<u>Virginian Hotel Co. v. Helvering</u> , 319 U.S. 523--	13
<u>Warnecke v. United States</u> , 256 F. Supp. 800----	25

Statutes:

Internal Revenue Code of 1954:	
Sec. 167 (26 U.S.C. 1964 ed., Sec. 167)-----	33
Sec. 6072 (26 U.S.C. 1964 ed., Sec. 6072)-----	36

Page

Miscellaneous:

H. Rep. No. 1337, 83rd Cong., 2d Sess., p. 22 (3 U.S.C. Cong. & Adm. News (1954) 4017)-----	12
Rev. Proc. 62-21, 1962-2 Cum. Bull. 418-----	31, 33
Rev. Rul. 90, 1953-1 Cum. Bull. 43-----	31
Rev. Rul. 91, 1953-1 Cum. Bull. 44-----	31
Treasury Regulations on Income Tax, Sec. 1.167(a)-1 (26 C.F.R., Sec. 1.167(a)-1)-----	12, 34

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,004

VERNON KEITH GRAVES and THEODORA GRAVES,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

No. 22,004-A

HAROLD J. GRAVES and BEULAH F. GRAVES,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (I-R. 53-66) 1/ are officially reported at 48 T.C. 7.

1/"I-R." and "II-R." references are to Volumes I and II of the record on review.

JURISDICTION

The petitions for review in these consolidated cases (I-R. 87-89, 90-92), involve federal income taxes for the taxable calendar years 1958, 1960, 1961, 1962, and 1963. 2/ On March 26, 1965 and March 1965, the Commissioner of Internal Revenue mailed to the respective taxpayers notices of deficiency (I-R. 4-10, 16-25) asserting deficiencies in income taxes in the following amounts for the years in issue (I-R.

<u>Docket Number</u>	<u>Petitioner</u>	<u>Year</u>	<u>Deficiency</u>
22,004	Vernon Keith Graves and Theodora Graves	1960	\$ 1,063.01
		1961	2,233.11
		1962	706.03
		1963	2,263.65
22,004-A	Harold J. Graves and Beulah F. Graves	1958	9,189.17
		1961	418.79
		1962	1,274.41
		1963	4,434.60

Within ninety days thereafter, on June 25, 1965, the taxpayers filed petitions with the Tax Court for redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-10, 13-25.) The decisions of the Tax Court were entered on June 8, 1967. (I-R. 76, 86.) The cases are brought to this Court by petitions for review filed on June 15, 1967 (I-R. 87-89, 90-92), within the three-month period prescribed in Section 7483 of the Internal Revenue Code. Jurisdiction is conferred on this Court by Section 7482 of the Code.

2/ The year 1960 is involved in No. 22,004 solely because of the elimination of a net operating loss carryback from 1963 due to the Commissioner's adjustments in the taxpayers' income for 1963. The year 1958 is involved in No. 22,004-A solely because of the elimination of a net operating loss carryback from 1961 due to the Commissioner's adjustments in the taxpayers' income for 1961. (I-R. 54.)

QUESTIONS PRESENTED

1. Whether the Tax Court was correct in concluding, as a factual matter, that the useful lives of the taxpayers' industrial structures and components therein had respective useful lives of thirty eight and twenty eight years for the purpose of computing depreciation deduction thereon.

2. Whether the Tax Court was correct in its factual conclusion that the Commissioner was not precluded, from adjusting the useful lives of the subject assets by reason of subsection 3.05 of Part II of Revenue Procedure 62-21.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are set out in the Appendix, infra.

STATEMENT

The relevant facts as found by the Tax Court may be briefly stated as follows:

Taxpayers Vernon Keith Graves and his wife, Theodora, are residents of Oregon. They filed joint income tax returns for the years 1960, 1961, 1962 and 1963 with the District Director of Internal Revenue for the District of Oregon. Taxpayers Harold J. Graves and his wife, Beulah, are residents of Oregon. They filed joint income tax returns for 1958, 1961, 1962 and 1963 with the District Director of Internal Revenue for the District of Oregon. (I-R. 55.)

Sawyers, Inc., is a manufacturer of stereoscopic slides, viewers and other photographic equipment, and it is also engaged in

research along these lines. Sawyers, Inc., maintains its home office and manufacturing complex in Progress, Oregon. Harold Graves was associated with Sawyers, Inc., for 34 years. He was president of the corporation and a member of its board of directors from about 1931 to 1957. (I-R. 55.)

In 1951, Sawyers, Inc., hereafter referred to as Sawyers, purchased land at 3500 N. Kostner Avenue, Chicago, Illinois, containing 23,043 square feet for \$17,722.38 3/ and in 1952, constructed a single story structure for \$158,579.61. A second floor was added during 1954 at a cost of \$95,870.13. The first and second floors contained a total of 28,500 square feet. On November 28, 1958, Sawyers purchased the adjoining land and building at 3512 N. Kostner Avenue from Bell & Howell Corporation for a total purchase price of \$366,375, which was allocated \$342,524 to the building and \$23,851 to the land. The two-story building at 3512 N. Kostner Avenue was constructed in 1952 and contained a total of 41,020 square feet. Sawyers used the Chicago property as a distribution center, a sales office, and for research and development. (I-R. 55-56.)

Sawyers used the following useful lives for the purpose of computing depreciation of the buildings at 3500 and 3512 N. Kostner Avenue:

<u>Location</u>	<u>Useful Life</u>	<u>Depreciation Commenced</u>
3500 N. Kostner Avenue	40 years	10/1/52
3500 N. Kostner Avenue (2nd Floor Addition)	38 years	10/1/54
3512 N. Kostner Avenue	34 years	1/1/59

3/ The Tax Court found an unexplained discrepancy in the stipulation in the cost of the land and the book value of the Chicago property as of August 31, 1959. (I-R. 55.)

The corporation did not separate the components from the buildings for the purpose of computing depreciation. (I-R. 56.)

As of August 31, 1959, the book value of the Chicago property owned by Sawyers was as follows (I-R. 56):

Buildings

3500 N. Kostner Avenue (Orig. bldg.)	\$ 131,160.48
3500 N. Kostner Avenue (2nd Floor Addition)	83,465.97
3512 N. Kostner Avenue	<u>335,807.84</u>
	\$ 550,434.29

Land

3500 N. Kostner Avenue	\$17,772.38	
3512 N. Kostner Avenue	<u>23,851.00</u>	<u>41,623.38</u>
		\$ 592,057.67

On September 1, 1959, the following stockholders of Sawyers acquired the Chicago property from the corporation in return for stock in Sawyers, having a value of \$592,057.67:

<u>Stockholder</u>	<u>Undivided Per-</u> <u>centage Ownership</u>
Harold J. Graves	36.90 percent
Beulah F. Graves	36.90 "
Vernon Keith Graves	10.81 "
Theodora J. Graves	.62 "
Robert Graves	10.81 "
Juanita M. Graves	.62 "
Rex Graves	<u>3.34</u> "
	100.00 "

The above stockholders are hereinafter called the owners. (I-R. 56-57.)

After acquiring the Chicago property the owners leased the property back to Sawyers under a written lease for a 5-year term starting on September 1, 1959 and ending August 31, 1964 at a monthly rental of \$3,000. The lease contained a renewal option which Sawyers

exercised thereby extending the lease term for the 5-year period starting September 1, 1964 and ending August 31, 1969 at a monthly rental of \$3,750. Under an instrument dated December 28, 1964, the owners, for a stated consideration of \$15,000, granted to Sawyers an option to lease the Chicago property for another term of 5 years starting on September 1, 1969 and ending August 31, 1974 at an annual rental of \$45,000. (I-R. 57.)

Under the terms of the lease the lessee was obligated to pay for insurance coverage of various types and to maintain the leased premises, including heating and air conditioning systems, interior wiring and plumbing, and drain pipes to sewers or septic tanks in good order and repair during the entire term of the lease at the lessee's own cost. (I-R. 57.)

For the purpose of computing the annual depreciation deduction on the Chicago property, the owners assigned a 25-year life to the two buildings and a 5-year life to heating, electrical and plumbing components of each building. A total depreciation deduction of \$39,387.51 was computed on their tax returns by the owners of the Chicago property for each of the years 1960, 1961, 1962 and 1963 as follows (I-R. 57-58):

<u>Asset</u>	<u>Cost</u>	<u>Useful Life</u>	<u>Depreciation</u>
Bldg. - 3500 N. Kostner	\$ 91,651.82	25 years	\$ 3,666.00
Heating, etc., components	39,508.66	5 "	7,902.00
2nd floor addition	65,566.89	25 "	2,622.69
Heating, etc., components	17,899.08	5 "	3,579.00
Bldg. - 3512 K. Kostner	284,648.34	25 "	11,385.93
Heating, etc., components	<u>51,159.50</u>	5 "	<u>10,231.89</u>
	\$550,434.29		\$39,387.51

A depreciation schedule showing the above computation was attached to the income tax returns filed by taxpayers (as well as the other owners of the Chicago property) for the years 1960 through 1963. In each of those years, the total depreciation of \$39,387.51 was subtracted from the \$36,000 received as annual rental of the Chicago property under the lease to show a net loss of \$3,387.51 each year in connection with the Chicago property. This net rental loss of \$3,387.51 from the Chicago property was then allocated to the various owners in each of the years 1960 through 1963 on the basis of their undivided interests in the Chicago property. (I-R. 58.)

The Commissioner determined in his statutory notices of deficiency that the two buildings at 3500 and 3512 N. Kostner Avenue in Chicago each had a useful life of 45 years and that the components in each of the buildings had a useful life of 25 years. Accordingly, he disallowed a portion of the depreciation claimed by the taxpayers in computing their rental income from the Chicago property in each of the years 1961, 1962 and 1963. (I-R. 58.)

On June 26, 1961, Harold J. and Beulah F. Graves filed an application for tentative carryback adjustment showing a 1960 net operating loss of \$12,855.97 carried back to 1957, generating a claimed 1957 refund of \$6,207.02. The 1957 refund was allowed on July 27, 1961 in the amount of \$6,207.02, plus interest of \$182.72. A revenue agent was then assigned to audit the relevant years and on June 18, 1962 he issued a report involving the years 1957, 1959 and 1960 which, after adjustments, allowed additional refunds of \$1,583.66

and \$500 for the years 1957 and 1959, respectively. The audit report showed two adjustments for 1959 involving (1) a mine expense deduction and (2) the amount of a capital loss. The audit report contained the words "no change" as to all items of income for 1960. (I-R. 59.)

On or about October 26, 1962, Harold J. and Beulah F. Graves filed a claim for refund of their 1958 taxes in the amount of \$9,251. resulting from the carryback of a 1961 net operating loss. A revenue agent was assigned to audit the relevant years and on May 24, 1963 he issued a report concerning the years 1958 and 1961 allowing a refund of \$9,189.17, plus interest, for 1958. The audit report contained the words "no change" as to all items of income for 1961. (I-R. 59.)

The respective taxpayers filed petitions for redeterminations with the Tax Court (I-R. 1-10, 13-25) and, upon a trial of the case, that court sustained the Commissioner's determination that the useful lives of the respective buildings as of September 1, 1959 was thirty-eight years and that the useful lives of the components of the respective buildings was twenty-eight years (I-R. 66). The Tax Court entered decisions accordingly. (I-R. 76, 86.) Thereafter, the taxpayers filed petitions for review to this Court. (I-R. 87-89, 90-)

SUMMARY OF ARGUMENT

The Tax Court's factual conclusion, that the useful lives of the two industrial buildings which the taxpayers owned in part were thirty-eight years and the useful lives of the components therein were twenty-eight years, for the purposes of computing depreciation on those properties, is not clearly erroneous and is entitled to affirmance on review.

The resolution of such a factual issue necessarily involves the application of a legal standard. In the instant case the issue relates to the useful lives of the Chicago properties and the legal standard, as set out in Treasury Regulation 1.167(a)-1(b), Treasury Regulations on Income Tax (1954 Code), and upheld and reiterated in Massey Motors v. United States, 364 U.S. 92, 97, may be fairly stated as follows:

The useful life of an asset is that period over which an asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of income. There is no dispute as to correctness of this standard or to its applicability in the instant case; it is the same rule which the lower court properly applied in reaching its decision. This rule or test requires an evaluation of certain physical and economic factors. Both factors play an equally important role in resolution of the fundamental issue of useful life. The lower court was cognizant of those two categories and obviously considered both in evaluating the evidence and in reaching its determination, notwithstanding certain verbiage in its opinion.

In determining the useful life of the structure which is here in issue, the physical factors which are pertinent to that determination include the condition and construction of the property, its geographic location, the location of the building on the lot, and the facilities within the structure. In like vein, the economic factors which are relevant include the availability of a labor force, the accessibility of the property to public transportation, the general demands for such building, zoning and planning involved, the highest

and best use of the property, and the present and future potentials of the property. However, evaluations and appraisals of the fair market value of the property are not relevant to the determination of useful life.

The estimation of the useful life of a particular asset may be substantiated by the opinion of an expert witness qualified to evaluate both the physical and economic aspects of a particular asset. The witness of the Commissioner, Mr. Kenney, was qualified to render an expert opinion as to the useful lives of the subject assets. He was a mechanical engineer and had served as a valuation engineer with the Internal Revenue Service for nine years. Kenney's testimony was entitled to the weight which the Tax Court gave it since that testimony was an evaluation of both the economic and physical factors involved in formulating a conclusion as to the useful lives of the Chicago properties. That testimony was relevant to the legal standard applicable in the case and was sufficiently comprehensive to be given great weight in the court's determination.

The Commissioner was not precluded from adjusting the useful lives of the Chicago properties by reason of Revenue Procedure 62-91. The prohibition in that procedure applies, by its specific terms, only when the evidence clearly establishes that the class lives of the assets have been examined and accepted and the taxpayer has the burden of establishing this by a preponderance of the evidence. In the instant case, the Tax Court found that there was no evidence establishing that the internal revenue agents ever made a specific examination of the depreciation deduction taken by the taxpayers and accepted

their depreciation computations. That factual conclusion of the lower court is supported by the record and is not clearly erroneous.

ARGUMENT

I

THE FACTUAL CONCLUSION OF THE TAX COURT, THAT THE TWO BUILDINGS HAD USEFUL LIVES OF THIRTY-EIGHT YEARS AND THE COMPONENTS THEREIN HAD USEFUL LIVES OF TWENTY-EIGHT YEARS, IS CONSISTENT WITH WELL SETTLED PRINCIPLES OF LAW AND BASED UPON THE RELEVANT RECORD EVIDENCE, AND IS ENTITLED TO AFFIRMANCE ON REVIEW

A. Introduction

The principal issue involved in this cause is whether the Tax Court correctly found and held that the useful lives of the two Chicago buildings which the taxpayers owned was thirty-eight years and the useful lives of the components in these respective buildings was twenty-eight years for the purpose of computing depreciation deductions under Section 167 of the Internal Revenue Code of 1954 (Appendix, infra). Section 167(a) provides, in language substantially unchanged in over fifty years, that there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear, including a reasonable allowance for obsolescence, of either property used in a business or property held for the production of income.

The regulatory translation and ampliation of that section, the validity of which is not questioned, sets out some general guidelines for computing the depreciation allowance. Section 1.167(a)-1(a) (Appendix, infra), provides that:

The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property, * * *. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. * * * The allowance shall not reflect amounts representing a mere reduction in market value. * * * (Emphasis supplied)

While the governing statute has at no time defined the term "useful life" (Massey Motors v. United States, 364 U.S. 92, 97), Treasury Regulations on Income Tax (1954 Code), Sec. 1.167(a)-1(b) (Appendix, infra), sets forth relevant considerations for determining that life as follows: 4/

(b) Useful life. For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage

4/ The term "useful life" was first inserted in the pertinent statutory provision in the Congressional enactment to the 1954 Code Section 167(b)(4). The accompanying House Report to the bill, H. Rep. No. 1337, 83d Cong., 2d Sess., p. 22 (3 U.S.C. Cong. & Adm. News (1954) 4017) stated:

Depreciation allowances are the method by which the capital invested in an asset is recovered tax-free over the years it is issued in a business. The annual deduction is computed by spreading the cost of the property over its estimated useful life.

value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and § 1.167(d)-1.

Depreciation has been characterized as the "reduction of the asset by wear and tear throughout its useful life in the business: as constituting, in theory, 'a gradual sale'; and as requiring a corresponding adjustment downward in original cost". United States v. Ludey, 274 U.S. 295, 300-301. It is settled that "the primary purpose of depreciation accounting is to further the integrity of periodic income statements by making a meaningful allocation of the cost entailed in the use * * * of the asset to the periods which it contributes." Massey Motors v. United States, *supra*, p. 104. In effect, the purpose of depreciation accounting is "to approximate and reflect the financial consequences of the subtle effects of time and use on the value of his capital assets. For this purpose, it is sound accounting practice to annually accrue * * * an amount which, at the time it is retired, will, with its salvage value, replace the original investment therein. Detroit Edison Co. v. Commissioner, 319 U.S. 98, 101. See also Virginian Hotel Co. v. Helvering, 319 U.S. 523, 526, 528.

In computing the useful life of an asset, it is equally settled that life must be related to the period for which the asset may reasonably be expected to be useful to the taxpayer in his business or in the production of income. Massey Motors v. United States, supra, p. 107.

B. The court below recognized and applied the legal standards reflected in the pertinent regulations and judicial decisions and was well justified in rejecting the testimony of the taxpayers' expert witness in support of a 25 year useful life

As reflected in the authorities heretofore discussed, the length of the useful life of property used in a taxpayer's business, for purposes of depreciation deductions with respect to federal income taxes, is the period over which, on the basis of all relevant information it appears that the particular taxpayer is likely to continue the use of the property in the production of his business income. This was recognized by both parties and by the court below. The taxpayers seem to complain that the Tax Court ignored entirely the testimony of their expert witness, Walther. This is obviously incorrect since the court pointed (R. 65) to the statements of that witness in which he agreed with the testimony of the Commissioner's expert witness. At most, the court rejected the conclusions of the taxpayers' witness in so far as they were relied on to justify a material reduction in the useful life of the property to these taxpayers, as opposed to the corporation, on the ground that there were certain aspects of the physical structure of the buildings which might cut short their otherwise productive life as used by the corporation and as testified to by the Commissioner's expert witness. The court's comments in

this respect, we concede, are not entirely clear but, we maintain, the court was, on this record, entirely justified, and indeed compelled, to reject the taxpayers' argument, based upon their witness's testimony as to so-called economic useful life, that they were justified in 1959 in reducing to 25 years the substantially longer useful life theretofore used by the corporation as the period over which it believed it would profitably use the building--an estimate the correctness of which the taxpayers do not challenge.

The theory upon which the taxpayers seek to justify this curtailed useful life (Br. 22-27) is that the property had a shorter useful life in their hands, as lessors, than it did in the hands of the corporation as the user of the property. See also testimony of their witness. (I-R. 87-88.) This is manifestly incorrect. The taxpayers argue that as lessors they had to secure a rental which provided a profit margin to them--which we do not contest. Their error lies in assuming as a conceptual predicate (Br. 22-27) that the underlying physical factors which will determine how long a business (here, that of the corporation) will use a given plant as owner are different than those which will govern either its willingness to continue use of the same plant as lessee, or the lessor's willingness to permit that use to continue. There is no authority for this novel proposition (taxpayers cite none) 5/ and the obvious reason for that is the patent error of the self-serving concept that a given property has a different (shorter) useful life in the hands of one holding it for lease than in the hands of the actual user.

5/ Heart of Atlanta Motel, Inc. v. United States, decided March 15, 1963 (63-1 U.S.T.C., par. 9402), cited by taxpayers (Br. 23) involves the useful life of property used in the motel business of the owner.

The taxpayers attempt to support their theory on the ground that a lessor must receive a profit on the arrangement. They err, however, when (without discussion) they make the assumption, essential to their theory, that for that reason, an owner can afford to use the property in his business longer than a lessor-owner could afford to lease that same property to him. The owner-user is motivated by the same profit seeking which controls the lessor and will continue to use in its business property owned by it only so long as that use represents as great a return as can reasonably be expected from the property. 6/ When substantially greater overall profits inherent in a different use of the property can be realized by (1) selling it (cf. the underlying events in Fribourg Nav. Co. v. Commissioner, 383 U.S. 272) or (2) razing the improvements then on the land, constructing other improvements of more promising rental value and holding it for lease to others, we need scarcely point out that this is what will be done-- just as a lessor would do. 7/

Approaching the question from another direction, the taxpayers contend that the lessor must, in order to continue holding a property for lease, realize an acceptable profit from the rentals over and above the annual loss in value from depreciation. They maintain

6/ The highest and best use concept discussed by the witnesses.

7/ E.g., the owner of a large piece of downtown property on which he has for years operated a hamburger stand, but which now has greater and growing income potential, based on location advances, as a site for an office building, etc. is not going to continue long to operate his hamburger business on that site. He will either discontinue that business or move it to a new site and either sell the land outright at its inflated value or, himself, erect thereon the new structure and hold it for the profitable leases available.

further, apparently, that, at the operating utility and efficiency of the building for the purposes of the lessee-user decreases, the rental it is willing to pay will also diminish until finally the point is reached at which the available rental will be so low that it is no longer sufficient to recoup for the lessor the annual loss of his invested principle through depreciation plus the profit margin which he requires to justify the continuation of the investment (i.e., the return for the use and tying up of his principal) and the lessor will not continue to hold it out for lease. The taxpayers entire contention rests on the erroneous assumption that, when the property is owned by the business which is using it, the latter requires a benefit from the holding and use of the property only sufficient to recoup the loss in value from depreciation but not to cover this profit margin and, thus, can profitably hold and use it for a longer period that if it were leasing the property to another. The benefit reaped by the business, of course, is the business profit which use of the property (whether as owner or lessee) enables it to achieve. In either capacity (owner or lessee), it can ecnomically (from the viewpoint of effective competition with others in its business) allocate only a given amount to the total costs of the particular business function for which it will employ the property in question. 8/ That maximum cost will necessarily cover all the costs of carrying on that function;

8/ Here, the function was that of a Chicago distribution center, sales office and research and development center. (I-R. 55-56.)

that is, it will cover both the cost of the right to use the building (whether as owner or lessee) plus any labor or other costs required to achieve the desired results from the building. The taxpayers argue, and we do not disagree, that, to the extent that undesirable design characteristics of a given building 9/ require the user to incur additional labor costs to carry out the desired function, the amount which can be profitably allocated to the cost of the bare right to use the building itself (e.g. the rental) is reduced accordingly. Again we say, however, that this is true whether the user acquires that right to use the building through a lease or through its own ownership and the rising labor costs cited by the taxpayers (Br. 25) as the factor which will ultimately reduce the rental value of the property to the point where a lessor would have to withdraw it from the leasing market will, at the same time, and for substantially the same reasons, shown below, force the user who also owns the property to dispose of it and replace it.

When the operator of a business purchases business property, it invests and ties up principal which it could otherwise use elsewhere to produce profit. A business elects to lease, rather than purchase, when it prefers not to make that investment but to use the required principal for other at least equally profitable purposes. That is the nature of the judgment involved as between purchasing or leasing; certainly, the operators of the business do not choose to lease in order to incur unnecessary costs or to make a gift to the lessor of

9/ Here, the taxpayers and their expert witness primarily cite the fact that the premises in question were of two story construction and without an elevator, thus requiring additional manpower.

the profit factor involved in the stipulated rental. When an election to purchase is made, 10/ the business user must forego the profit, or equivalent benefit, 11/ which it could have received from investment elsewhere of the cost of acquisition. Consequently, in order to continue economically and efficiently to hold and use the property in question as owners, the business user-owner would have to receive business benefit from its use in amount or value sufficient to cover both the loss of principal through depreciation plus the loss of the value of using the invested principal for other income producing purposes. Specifically, when the cited increasing costs of labor rose to the point where they, plus the bare cost of the right to use the instant premises (depreciation plus the annual income value of the principal tied up in its ownership) exceed the cost of, e.g., carrying out the business function by leasing other suitable property, the logical, common-sense, business move would be, just as in the case of the lessor, to liquidate the investment in the property by sale and to acquire or lease other property. Consequently, the above theory, upon which the taxpayers seek to justify the marked reduction in useful life from that used by the corporation is totally fallacious, as well as without supporting authority.

In addition to the above, the testimony of the taxpayers' expert witness is incapacitated because addressed to an hypothetical situation not found in the record facts of this case. His 25 year

10/ An election not to sell has the same effect, of course.

11/ By equivalent benefit, we mean, e.g., the saving of the cost of leasing other types of needed business property which it may have been enabled to purchase with the proceeds of the sale of the instant property.

estimate is based on the leasing prospects where it would be necessary to find tenants in the open market to whom the design of the buildings in question would be acceptable in light of the rental required. But, here, the design was concededly well suited to the needs of the existing tenant which had gone on record as having the intent and expectation of using the property in its business for a substantially longer period than the witness' 25 year estimated life. The following facts are here significant.

The first of the two parcels was acquired in 1951; the corporation (the existing tenant) built a single-story structure thereon in 1952 and in 1954 (just five years before the transfer to the taxpayers) itself added the second floor. (I-R. 55-56.) If that second floor represented a disadvantage of its intended business use of the premises the corporation went to great trouble and expense to handicap itself. With free opportunity to design the new structure best to suit its needs, the corporation elected the existing design. Had it regarded an elevator as advantageous, or its lack as built-in obsolescence, we may assume it would have installed one.

Next, it purchased in 1958 (just one year before the transfer) the second parcel which had an existing two-story structure thereon. Again, we may assume that if this design was not suitable to its needs, it would not have purchased this property at the substantial price paid. 12/ Moreover, it recorded an intended use of these buildings in its business for a period of from 34 to 40 years. Significantly, at the time all of this was being done by the corporation

12/ Note that only a small fraction of the cost was for the land. (I-R. 3.)

Harold Graves (one of the taxpayers herein) was first president of the corporation and a member of its board of directors and then chairman of the board. (I-R. 57.)

From all of this, it is apparent that the building were regarded by the corporation as eminently suited to its needs and that it anticipated using them in its business for a period substantially longer than the useful lives adopted by the taxpayers as lessors. Indeed, the taxpayers themselves concede (Br. 18) that the structural characteristics cited by their expert witness as the basis of his view that they represented an obsolescence factor did not adversely affect the use by the corporation. The witness' opinion, being based on the hypothesis that the structural design represented a significant disadvantage to a tenant, obviously is irrelevant with respect to prospective continued use by Sawyers, Inc.--the present and probable future tenant.

Recognizing this, the taxpayers self-servingly conjecture that the corporation will not renew because (Br. 26-27) it is not legally obligated to do so. But probabilities are what fixes useful life and certainty is not required. The taxpayers seek to attach great significance to the fact that, with its latest lease renewal for the period ending 1969, the corporation took an option upon a further five year period until 1974 at the same rental, rather than take a lease for the full ten year period as allegedly offered by the lessors. In support, they cite the testimony of one of the taxpayers, Harold Graves, who conjectured that the reason was that 'They didn't want to become obligated for a ten year lease, naturally.' Apart from the

doubtful competency of Graves to testify to the motivations of the corporation, the statement is innocuous, even if taken as true, since a wish to lease only on five-year bases had marked the corporation's practice from the time of the 1959 transfer and each had contained an option for a further five-year period. (I-R. 5.) Moreover, with respect to the corporation's obvious continued satisfaction with the design of the building, although the taxpayers' position (and the testimony of their witness) is based upon a projected declining rental value for the property, we note that the corporation exercised its option for the second five-year period ending 1969 at an increased rental. 13/ The corporation's probable intent to renew again for the next five-year period is manifested by its willingness to invest the \$15,000 option price, which may well have been regarded by it as the cost to it of assuring no further increase of rental rate during that period in the face of a steadily rising rental market. Certainly Graves' self-serving and totally unexplained comment (I-R. 56) that he fears the option will not be exercised is meaningless in the face of the facts. The only possible reason suggested for non-renewal would be the so-called "obsolescence" features which, it has already been shown and conceded, do not apply to use by Sawyers, Inc.

Further evidencing the reasonable expectation that Sawyers, Inc., would continue to lease the property (or that it would be leased in any event) is the taxpayers' willingness to acquire it in 1959 at the corporation's book value (I-R. 4) and their use of that figure

13/ And, since the use by Sawyers, Inc. is not in any way special or unusual, we may reasonably assume that other companies would find the design equally satisfactory to their purposes, if it became necessary to find a new tenant.

as their cost basis. The taxpayers contend (Br. 31-32) that the market value of the property was lower than the depreciated book value due to the fact that inadequate depreciation had been taken. If they really believed this, or that the useful life (and thus value) would be less in their hands than in the hands of the corporation, we submit, they would not have dealt with the corporation on these terms.

Since, on the record as discussed above, the taxpayer has shown no factual basis for a belief that Sawyers, Inc., will not continue to lease the property, or that the taxpayers will be faced with the need to find new tenants, the witness' opinion, based on a contrary hypothesis, is disqualified. Moreover, should it come to pass in the future that, for any reason, Sawyers, Inc., does not renew its lease, the design factors relied upon by the taxpayers' witness will for the first time become relevant and may then be taken into account in determining the then remaining useful life of the property and an appropriate adjustment made in the taxpayers' depreciation schedule.

We believe that the Tax Court was warranted in rejecting the 25 year life opinion of the taxpayers' witness for one further reason. That opinion rests virtually entirely on the fact of the two-story construction of the buildings and the lack of an elevator. The witness failed completely to mention or take into account the possibility 14/ that, should this situation at any time in the future prove to be a deterrent to further profitable leasing, it could, as any other problem of that nature, be remedied by (1) installation of an elevator or (2) knocking out the ceiling between the two floors so

14/ This may have been because the witness had no background as an engineer. (I-R. 45.)

as to create the situation (a high ceilinged one-floor structure) which the taxpayers' witness regarded as so desirable. This would, of course, add to the taxpayers' depreciable basis in the property but is no reason to ignore the then continuing use in the production of the taxpayers' income of the original structure, the cost of which must be allocated to the years in which it would be used following the modification as well as the years prior thereto. 15/ In short, proper estimation of the useful life of the property must take into account the additional period of usefulness of the original investment which would result from such modification and the failure of the taxpayers' witness to do so constitutes use of an improper standard and invalidates his opinion testimony.

In any event, we call the Court's attention to the fact that to the extent the taxpayers' witness relied upon economic theories of obsolescence to justify a 25 year useful life on the buildings, this has no relevance to the question of the proper useful life of the physical components of the buildings since both expert witnesses predicated their estimates of useful life on the full physical utility of those components, not upon any economic obsolescence. On this factual controversy, the Tax Court obviously adopted the estimates of the Commissioner's witness.

15/ It is worth noting here, in connection with taxpayers' theory (Br. 23) that the location might outgrow the building that, as of August 31, 1959, of the total book value of the properties of \$592,057.67, only \$41,623.38 was allocated to the land itself (to which value resulting from location must accrue) with the balance being allocated to the structures. This book value reflects the actual market values established by the purchases and construction just a few years earlier. (I-R. 3-4.)

C. The Tax Court's findings, based upon the entire record, are not clearly erroneous and entitled to affirmance

The issue at hand, being the useful life of the subject assets, is basically factual and the lower court's finding with respect to it are entitled to affirmance unless clearly erroneous. Estate of Bryan v. Commissioner, 364 F. 2d 751 (C.A. 4th); Dinkins v. Commissioner, 378 F. 2d 825 (C.A. 8th). It is clear that the taxpayers have the burden of proving by a fair preponderance of the credible evidence that the determination of the Commissioner is erroneous. Southeastern Bldg. Corp. v. Commissioner, 148 F. 2d 879 (C.A. 5th); Warnecke v. United States, 256 F. Supp. 800 (S.D. N.Y.); Bay Sound Transportation Co. v. United States, decided April 30, 1967 (20 A.F.T.R. 2d 5418). We have already shown the deficiencies in the testimony of the taxpayers' expert witness and that the Tax Court correctly rejected it. Therefore, the taxpayers have failed to meet that burden and decision for the Commissioner followed, of necessity.

However, if more were required, the Commissioner's determination, and the holding of the Tax Court, was fully supported by the testimony of the expert witness, Kenney. He was a "valuation engineer" with the Internal Revenue Service, having received a college degree in mechanical engineering and been registered as a professional engineer in the State of Kentucky. (II-R. 67-68.) He had been involved in the examination of buildings and properties throughout the entire Chicago metropolitan area for about nine years for the Internal Revenue Service. (II-R. 67, 68.) He had, on prior occasions,

testified before the Tax Court as an expert for the purpose of determining useful lives. (II-R. 68-69.) Kenney was not only familiar with the subject properties by reason of having viewed the area in the past but made an examination of the subject properties for the specific purpose of determining their useful lives as of September 1, 1959. (II-R. 69, 70.)

Kenney stated that in his opinion the useful lives of the buildings were thirty-eight years, and further stated that the useful lives of the components were twenty-eight years as of September 1, 1959. (II-R. 71.) Kenney stated that he considered certain factors in arriving at his determinations, and that among these were the location of the property, accessibility to public transportation, conditions and constructions, the location and position of the buildings on the lot and property, facilities within the structure, availability of labor force, general demands of such building, zoning and planning involved, and most assuredly the present and future potentials of the property. (II-R. 71-72.) Kenney expressed his opinion as to each of those factors as they related to the subject properties, and in each instance, his opinion supported his estimates of useful lives. (II-R. 72-82.)

Kenney's specific responses to those various factors may be summarized as follows: The properties were located in an excellent area (industrial) (II-R. 72), and easily accessible to public transportation (II-R. 75). The condition of the buildings "was

'exceptionally good.' The construction was modern and the buildings had proper loading docks and facilities for general light industrial activities. (II-R. 76.)

The land was utilized to its highest and best use by arrangement of the property as it was. (II-R. 78-79.) By this Kenney meant that best use of land was to have an industrial building on it. (II-R. 83.) Both properties had good arrangements for the activities they were in at the particular time 15/ and could be rearranged for any office work or other like manufacturing as would be necessary. (II-R. 80.) There was adequate availability of a labor force necessary to Sawyers or any other lessee of the taxpayers. (II-R. 80.) Buildings of the type that are in issue were in great demand throughout the Chicago area. (II-R. 80-81.) Kenney's opinion in sum was that the buildings were located in an excellent area, so good, that "none other in Chicago that can rate with it." (II-R. 81.) It had great possibilities for utilization as office space, warehouse space, light manufacturing, particularly electronics, and other assembly operations. (II-R. 81.) The taxpayers' expert witness acknowledged that he agreed with much of Kenney's testimony. (II-R. 85.)

1. The Tax Court was correct in deciding that the Commissioner's witness, Mr. Kenney, had the qualifications to render an expert opinion as to the useful lives of the subject properties

We submit that Kenney was qualified to render an expert opinion, i.e., to testify as an expert witness, on the issue at hand, and the 15/ Kenney later elaborated upon his statement that the property had good arrangement. (II-R. 83.) He stated that this term meant "The arrangement of the property, lay of the buildings, * * * such as the loading docks with reference to their distribution and use of the building." (II-R. 83.)

Tax Court, in the exercise of its function as the trier of facts, properly accepted his testimony.

It is well settled that the question of whether a witness called to testify to a matter of opinion has such qualifications and knowledge as to make his testimony admissible on the issue in controversy is a preliminary question for the trial judge and his decision of it is conclusive, i.e., should not be reviewed on appeal unless clearly shown to be erroneous as a matter of law. Turner v. American Security & Trust Co, 213 U.S. 257; Stillwell Manufacturing Co. v. Phelps, 130 U.S. 520.

To determine whether the Commissioner's witness had the necessary qualifications to render an expert opinion on the issue at hand, it is necessary to view his qualifications against that issue and the tests or factors employed to resolve it. Here, we are concerned with the period the Chicago properties may reasonably be expected to function profitably in the taxpayers' business of leasing the structures. The Treasury Regulations on Income Tax (1954 Code), §1.167(a)-1(b), sets out certain factors which may be considered in determining this period. Those factors, in so far as here relevant, include, (1) wear and tear, decay and decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current development within the industry and the taxpayers' trade or business, and (3) the climatic and other local conditions peculiar to the taxpayers' trade or business.

The Commissioner's expert witness was eminently well qualified to render an expert opinion on the useful lives of the subject assets as used in the taxpayers' business based upon the above factors. Kenney was formally educated in mechanical engineering, had served for nine years as a valuation engineer with the Internal Revenue Service and had testified in prior Tax Court proceedings with respect to useful life. (II-R. 67-69.)

Moreover, the taxpayers did not, at trial, challenge the qualifications of Kenney to give the testimony here in question. Counsel questioned only the witness' qualification to testify about "economic useful life." (I-R. 70-71.) However, he made no objection when the witness discussed such relevant matters as the general demands of such building (I-R. 80-81), the present and potential use of the property (I-R. 81), the location, size and utilization of the inside space (I-R. 78-79), and the zoning and planning involved (I-R. 81).

2. The Tax Court properly refused to admit the appraisal report dealing with the fair market value of the Chicago buildings on a date subsequent to the years in issue

The Tax Court refused to admit in evidence an appraisal report on the 1964 fair market value of the Chicago properties. (II-R. 38.) We submit that the lower court was entirely correct.

It is clear that evidence of fair market value has no relevance to the determination of useful life. It is only relevant in the determination of the adjusted basis of property subject to the

allowance for depreciation and in the determination of salvage value. Estate of Bryan v. Commissioner, supra. As the Court of Appeals stated in Estate of Bryan, supra, p. 753, "[The] mere fact that, at the midlife of an asset, its basis is either higher or lower than its market value, indicates nothing so far as we can see about the accuracy of the useful life estimate."

The taxpayers' reliance (Br. 31) upon Fribourg Nav. Co. v. Commissioner, supra, is entirely misplaced in that, among other reasons, the taxpayers represent it as having passed upon the rules governing useful life, whereas that case was concerned only with the question of the proper salvage value--a completely independent question. In sum, the opinion held only that the fact that an asset had been sold for a price in excess of its adjusted basis in the year of sale did not alone indicate that the salvage value originally set up at the time the asset was acquired was unreasonable and entitle the Commissioner to deny a depreciation deduction for the year of sale. Not only are the taxpayers in error in claiming authority in that case for the proposition that "fair market value above depreciated basis is evidence of a miscalculated economic useful life", or any other kind of useful life, that decision and the appellate court decision therein approved (see e.g. United States v. S & A Co., 338 F. 2d 629 (C.A. 8th)) hold that fair market value in the middle of an asset's useful life is no evidence of anything (cf. the holding in Estate of Bryan, supra) and a comparison thereof with the then adjusted basis is not even evidence that the estimated salvage value

16/ Treasury Regulations on Income Tax (1954 Code), Section 1.167(a)-1 (b) specifically provides that "Salvage value is not a factor for the purpose of determining useful life."

(which has a specific relationship to market value, whereas useful life has none) was unreasonable or incorrect. Consequently, the taxpayers' arguments, based on this specious construction of Fribourg, supra, are unsound and the Tax Court's refusal to admit the report into evidence was entirely correct.

II

THE TAX COURT WAS CORRECT IN CONCLUDING THAT
THE COMMISSIONER'S ADJUSTMENTS OF THE USEFUL
LIVES OF THE CHICAGO PROPERTIES FOR
DEPRECIATION PURPOSES WAS NOT PRECLUDED BY
REV. PROC. 62-21 OR ANY PRIOR REVENUE RULING

Immediately before the start of the trial before the Tax Court, the taxpayers amended their petitions to allege that the Commissioner was precluded by Rev. Proc. 62-21, 1962-2 Cum. Bull. 418, from disturbing the depreciation deductions claimed by them in the Chicago properties. (I-R. 59.) They argued below and contend on brief before the Court that the useful lives assigned to the buildings in Chicago, as well as the components of such buildings, were accepted by the internal revenue agents within the meaning of subsection 3.05 of Part II of the Rev. Proc. 62-21. (I-R. 60.)

Rev. Proc. 62-21, which was promulgated in July of 1962, and not made retroactive, represents a basic reform in the procedures and standards to be followed in computing depreciation for the purposes of taxation. This revenue procedure, replacing the Bulletin F guidelines, Rev. Rul. 90, 1953-1 Cum. Bull. 43 and Rev. Rul. 91, 1953-1 Cum. Bull. 44, supplies new guidelines for broad classes of assets which, generally, permits a more rapid depreciation of assets. The

unique feature of the new revenue procedure is that it employs a mechanical test, the reserve ratio test, to determine the appropriateness of depreciation deductions taken by a taxpayer. The reserve ratio test is an objective technique for establishing that a taxpayer's retirement and replacement practices for a guideline class of assets are consistent with the class life he is using.

Part I of the revenue procedure provides guideline lives for broad classes of assets; Part II contains a detailed description of procedures to be followed in examining depreciation deductions. Subsection 3 of Part II describes the procedures to be followed when the taxpayer's class life is shorter than the prescribed guideline lives. This is the problem attendant in the instant case.

Subsection 3.05 of Part II, the only subsection of the revenue procedure which is in issue, provides as follows:

.05 Subsequent use of class life previously justified.--Where the class life used by a taxpayer was examined by the Internal Revenue Service and was accepted by reason of subsection .02, .03, or .04 of this section, or where such class life was accepted on audit by the Internal Revenue Service under presently established procedures for examining depreciation (whether before or after the effective date of this Revenue Procedure), the depreciation deduction claimed by the taxpayer for the assets in that class in any subsequent taxable year based on that class life will not be disturbed if the taxpayer's retirement and replacement practices for that class are consistent with the class life being used. This consistency may be demonstrated either by the reserve ratio test set forth in section 5 of this Part or by all the facts and circumstances.

Subsection 3.05 then goes on to state that the "previously justified" class life will not be questioned during a period of three years in

order to give taxpayers an opportunity to conform their retirement and replacement practices with the class life being used. It provides that:

The reserve ratio test is a technique for establishing objectively that the taxpayer's retirement and replacement practices for a guideline class are consistent with the class life he is using. If the test is met, the depreciation deduction for that class will not be disturbed. In order to give taxpayers an opportunity where needed to conform their retirement and replacement practices with the class lives being used, the reserve ratio test will be considered to be met for the first three taxable years to which this Revenue Procedure applies. The previously justified class life will not be questioned during that period. Thereafter, if the test is not met, a taxpayer may by the use of presently established procedures demonstrate that his retirement and replacement practices are consistent with the class life being used.

On the basis of the record evidence, the Tax Court found and so held (I-R. 62-63) that the class lives used by the taxpayers was not examined or accepted on audit by the Internal Revenue Service and, therefore, the Commissioner was not precluded from later adjusting the useful lives of the Chicago properties for the years 1961, 1962, and 1963. We submit that this conclusion is supported by the record and entitled to affirmance.

It is clear that a class life will be considered "accepted on audit" under subsection 3.05 when the evidence establishes that the class life has been specifically examined and accepted. Question 49 of the interpretative questions and answers that accompany Rev. Proc. 62-21, 1962-2 Cum. Bull. 477, serves to firmly establish that this is the correct interpretation of that subsection. That question

interprets the phrase "accepted on audit", used in subsection 3.05, as covering all situations in which the audit report shows adjustments to class life or contains comments that it was examined but not adjusted, or where other specific evidence indicates that the class life was examined. The record in the instant case is devoid of any evidence whatsoever establishing that there was a specific audit, or examination of any sort, of the taxpayers' depreciation deductions on the Chicago property within the meaning of subsection 3.05 of the revenue procedure.

In the lower court, the burden of proof was, of course, upon the taxpayers to establish, by clear and convincing evidence, that the useful lives of the Chicago properties was "accepted on audit" within the meaning of subsection 3.05 of the revenue procedure; because this issue is basically one of fact, the taxpayers must now establish that the Tax Court's factual findings with respect to this issue are clearly erroneous. Commissioner v. Duberstein, 363 U.S. 278. The evidence, however, clearly supports the conclusions of the lower court.

Taxpayers Harold and Beulah Graves, under letter dated June 26, 1961, filed an application for a tax refund based upon a tentative net operating loss incurred in 1960 and a carryback adjustment to the taxable year 1957; this carryback and refund were allowed. (I-R. 37, Stip., par. 13.) Revenue Agent Andrews audited the claim and issued audit reports concerning the taxable years 1957, 1959, and 1960. (I-R. 37, Stip., par. 14.) In 1962, the same taxpayers filed a

claim for refund of 1958 taxes generated by another net operating loss in 1961 and an attendant carryback to the year 1958. Revenue Agent Miller audited the refund and issued an audit report concerning the years 1958 and 1961. (I-R. 37, Stip., par. 15.) The two audit reports, one covering the years 1957, 1959 and 1960 and the other covering 1958 and 1961, were introduced in evidence but as the Tax Court correctly found (I-R. 62), 'neither one * * * [contained] the slightest comment or any other 'specific evidence' that the depreciation deductions on the Chicago property (acquired in September 1959), as shown on the returns of Harold J. and Beulah F. Graves were examined." The audit reports indicated merely that no changes had been made since both reports had printed on them the words "no change". (I-R. 59.) Moreover, there was no occasion, or opportunity, for the agents making the audits to examine the property since the audits were performed in Portland, Oregon, and the property was located in Chicago; there was no evidence that those agents ever requested a collateral investigation of the property. Finally, although both agents were present at trial and willing to testify with respect to their audits, the taxpayers never questioned either one, in open court, on this subject. (I-R. 63.) The Commissioner here maintains that a "no change" result after audit frequently means that a particular item has been accepted, for that year and at that particular time (subsequent re-audit of the same return might go into it more closely), without examination. The taxpayers simply choose, without supporting evidence or authority, to assume the contrary--i.e., that an

examining agent never indicates "no change" with respect to any item unless he has specifically examined not only it but every underlying or contributing item. The taxpayers, having the burden of proof in this case, had the opportunity to obtain the best evidence as to the practices on audit with respect to this, in general, or the specific scope of the audit in the instant case, yet failed to do so. Having so failed, they should not be allowed to attach any greater significance to the otherwise uninformative notations on the reports. Were there merit in the taxpayers construction, we may assume that the revenue procure would have conferred finality upon the mere appearance of the words "no change". Instead it was required that an actual examination have been made and the taxpayers have failed to show this.

In addition, and aside from the above considerations, we submit that the revenue procedure has no application to the subject audits made with respect to the calendar years 1960 and 1961 (I-R. 59), since that procedure, by its express terms, does not apply "to examinations of depreciation claimed for taxable years for which returns were due to be filed before July 12, 1962." 1962-2 Cum. Bull. 429, fn. 2. In the instant case, the alleged examinations were made on returns due to be filed prior to July 12, 1962. The examinations were made with respect to the years 1960 and 1961. (I-R. 59.) And it is certain that the taxpayers' return for 1961, the latest year audited, was due on or before April 15, 1962, (Section 6072(a), Internal Revenue Code of 1954), which is prior to the date of the revenue procedure, July 12, 1962.

In any event, since it is undisputed that the tax returns of Vernon and Theodora Graves were never audited, these taxpayers cannot claim the application of the revenue procedure to them by reason of the audit of Harold and Beulah Graves' returns.

CONCLUSION

For the reasons stated above, the decisions of the Tax Court are correct and should be affirmed on review.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
WILLIAM A. FRIEDLANDER,
ROBERT I. WAXMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

DECEMBER, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1967.

Robert I. Waxman
Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 167. DEPRECIATION.

(a) General Rule.--There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)--

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) Use of Certain Methods and Rates.--For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method,

(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1),

(3) the sum of the years-digits method, and

(4) any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the taxpayer's use of the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

*

*

*

Treasury Regulations on Income Tax (1954 Code):

§ 1.167(a)-1 Depreciation in general.

(a) Reasonable allowance. Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and § 1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and § 1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and § 1.179-1 for a further description of the term "reasonable allowance."

(b) Useful life. For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be considered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful life. If the taxpayer's experience is inadequate, the general experience in

the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and § 1.167(d)-1.

*

*

*

(26 C.F.R., Sec. 1.167(a)-1.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON KEITH GRAVES and
THEODORA GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

HAROLD J. GRAVES and BEULAH
F. GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

FILED

JAN 30 1968

WM. B. LUCK, CLERK

APPELLANTS' REPLY BRIEF

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON
William H. Kinsey
Stephen B. Hill
12th Floor Standard Plaza
Portland, Oregon 97204

Attorneys for Appellants

RECEIVED

JAN 30 1968

WM. B. LUCK, CLERK



INDEX

	Page
Table of Cases and Authorities.....	11
Argument.....	1
Commissioner Recognizes Tax Court Gave Invalid Reason for Disregarding Obsolescence but Endeavors to Salvage Decision by Advancing New Theory Lacking Factual Support	1
Commissioner Misinterprets the Context in Which Petitioners Offered the Appraisal Report Showing Fair Market Value of the Buildings.....	8
The Commissioner Garbles the Best Evidence Rule in an Effort to Avoid the Impact of Revenue Procedure 62-21.....	10
Effect of Revenue Procedure 62-21 Upon 1960 and 1961.....	13
Application of Revenue Procedure 62-21 to Vernon and Theodora Graves.....	14
Commissioner Ignores His Own Declaration of Policy Concerning Adjustments in Depreciation Deductions.....	14
Certificate.....	17

TABLE OF CASES AND AUTHORITIES

Dinkins v. Commissioner, 378 F. 2d 825 (8th Cir. 1967).....	15
Estate of Bryan v. Commissioner, 364 F. 2d 751 (4th Cir. 1966).....	8, 15
Fribourg Nav. Co. v. Commissioner, 363 U.S. 272 (1966).....	10
Hertz Corporation v. United States, 364 U.S. 122 (1960).....	16
Massey Motors v. United States, 364 U.S. 92 (1960).....	4, 5, 9, 16
Southeastern Bldg. Corp. v. Commissioner, 148 F. 2d 879 (5th Cir. 1945).....	15
Warnecke v. United States, 256 F. Supp. 800 (S.D. N. Y. 1966).....	3, 16

Other

Rev. Proc. 62-21, 1962-2 Cum. Bull. 418.....	10, 13, 14
Rev. Rul. 90, 1953-1 Cum. Bull. 43.....	14

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VERNON KEITH GRAVES and
THEODORA GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

HAROLD J. GRAVES and BEULAH
GRAVES,

Appellants,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

APPELLANTS' REPLY BRIEF

Commissioner Recognizes Tax Court Gave Invalid Reason
for Disregarding Obsolescence but Endeavors to Salvage
Decision by Advancing New Theory Lacking Factual Support

No objection is voiced in the Commissioner's brief to the actuality of the obsolescence features cited by petitioners' expert witness as the basis for his testimony supporting a 25 year economic useful life for the Chicago Buildings. Although the Commissioner concedes the obsolescence features have an adverse impact if tenants must be sought on the open rental market, he claims the features do not affect economic useful life

of petitioners because petitioners are assured of retaining
Sawyers, Inc. as a tenant for substantially longer than 25 years.
(Br. 19-20)

Such contention of the Commissioner is no sounder
than the evidence supporting the assertion that petitioners can
count upon retaining Sawyers, Inc. as a tenant for substantially
longer than 25 years. Completely lacking is any finding of the
Tax Court on the anticipated length of Sawyers, Inc.'s tenancy.
The Tax Court rejected the testimony of petitioners' expert witness
concerning the obsolescence features, not because Sawyers, Inc.
was an assured tenant, but because the testimony was directed
to an erroneous (in the eyes of the Tax Court) definition of
economic useful life involving factors deemed irrelevant by the
Tax Court, such as highest and best use of the land and market
reaction. (R. 65-66)

The Commissioner tacitly accepts the definition of
economic useful life upon which petitioners' expert witness
based his obsolescence testimony,¹ and acknowledges the materiality

¹ The Commissioner evolves the following definition of
economic useful life from the authorities reviewed by him (Br. 14):
". . . the period over which, on the basis of all
relevant information, it appears that the particular
taxpayer is likely to continue the use of the property
in the production of his business income."

The definition used by petitioners' expert witness as the basis
for his testimony was:

How long it takes before the return on the land plus
the building would be no more than the return on the
land alone.

Obviously, a taxpayer is not likely to continue the use of a
rental building beyond the time the return on the land plus the
building is no more than the return on the land alone, so there
is complete compatibility between the definitions of economic
useful life.

materiality of economic factors such as whether a rental building constitutes the highest and best use of the land.² This amounts to recognition by the Commissioner that the Tax Court gave an invalid reason for disregarding the obsolescence features. Nevertheless, the Commissioner endeavors to salvage the decision on the ground that a similar result is dictated by the new theory advanced in his brief, i.e., - the obsolescence features have no impact upon determination of economic useful life for petitioners because petitioners can count upon retaining Sawyers, Inc. as a tenant for substantially longer than 25 years.

As sole evidence of petitioners' ability to retain Sawyers, Inc. as a tenant for substantially more than 25 years, the Commissioner points to the fact that the economic useful life assigned the buildings by Sawyers, Inc. for depreciation purposes had 33 years to go when petitioners acquired the buildings on September 1, 1959 and leased them back to Sawyers. (Br. 20-21) According to the Commissioner, this constituted a manifestation that Sawyers, Inc. not only could but would profitably use the buildings for substantially more than 25 years. (Br. 15 and 21) Petitioners acknowledge Sawyers, Inc. should be regarded as an assured tenant during such period

²Footnotes 6 and 7 (Br. 16) and the text to which they relate. The Commissioner cites with approval (Br. 25) the case of Warnecke v. United States, 256 F. Supp. 800 (S.D. N.Y. 1966) containing as a material finding the fact that the building in question "represented the highest and best use of the underlying land." (256 F. Supp. 802). A building which represents the highest and best use of the land on a given date will naturally have a longer economic useful life than one which does not.

as the evidence shows Sawyers could and would profitably use the buildings. Where petitioners and the Commissioner part company is over the question of whether the assignment of economic useful life to the buildings by Sawyers, Inc. for depreciation purposes establishes that Sawyers, Inc. could and would profitably use the Chicago Buildings for substantially longer than 25 years from September 1, 1959.

Sawyers, Inc. made its determination of economic useful life prior to the decision of the Supreme Court in Massey Motors v. United States, 364 U.S. 92 (1960). At that time, many informed taxpayers thought economic useful life was the full abstract life inherent in the general class of property, rather than the economic useful life of the particular property as employed in the taxpayer's particular business. Even if Sawyers, Inc. is charged with knowing the law as announced in Massey Motors, supra, the designation of economic useful life should not be interpreted as assurance that Sawyers, Inc. could, much less would, profitably use the buildings for the assigned life. This is made clear by the following quotation from Massey Motors v. United States, supra at 96-7:

"In practical life, however, business concerns do not usually know how long an asset will be of profitable use to them or how long it may be utilized until no longer capable of functioning. But, for the most part, such assets are used for their entire economic life, and the depreciation base in such cases has long been recognized as the number of years the asset is expected to function profitably in use."

"Some assets, however, are not acquired with intent to be employed in the business for their full economic life. It is this type of asset, where the experience of the taxpayers clearly indicates a utilization of the asset for a substantially shorter period than its full economic life, that we are concerned with in these cases."

(Emphasis added)

As recognized by the Supreme Court in the above quotation, business concerns in practical life do not know how long an asset will be of profitable use, despite the necessity of making a guesstimation for depreciation purposes. Even if Sawyers, Inc. were an exception to the general rule and knew precisely how long it could profitably use the buildings in its business, assignment of an economic useful life does not evidence an intention to actually use the buildings for the full period of anticipated profitability. As the Supreme Court stated, some businesses, such as the taxpayer in Massey Motors, acquire assets with no intention of employing them for the full economic useful life.

When placed in proper perspective, the fact that the economic useful life assigned the buildings by Sawyers, Inc. had 33 years to run offers scant support for the Commissioner's assertion that Sawyers, Inc. anticipated using the buildings in its business for a period substantially longer than 25 years. If the useful life assigned the buildings by Sawyers, Inc. is any evidence on the subject, it does not survive the impact of more pertinent evidence. The lease was for only five years with a five year renewal option. Such form of the lease

reflected the desire of Sawyers, Inc., not petitioners, since a lessor prefers a firm ten year lease over a five year lease with a five year renewal at the lessee's option. It stands to reason that Sawyers, Inc. would not have insisted upon a five year' lease with a five year renewal option if Sayers, Inc. really intended to lease the Chicago Property for more than 25 years.

Similar indecision on the part of Sawyers is evidenced by the renewal option granted on December 28, 1964 permitting an additional five years from September 1, 1969 to August 31, 1974. Sawyers, Inc. paid \$15,000 for the option which did not give Sawyers, Inc. the right to apply the \$15,000 option price against the rental in the event the option were exercised. If Sawyers, Inc. definitely intended to rent the buildings for more than 15 years after August 31, 1969 (as the Commissioner claims), Sawyers, Inc. would have executed a firm lease for at least the first five years of such period and saved the \$15,000 option price. Harold Graves testified that he had no expectation Sawyers, Inc. would exercise the option. The Commissioner dismisses the testimony of Harold Graves as self-serving. Who was in a better position to testify on the subject? Not only was Harold Graves the dominant owner of the Chicago Property, but he was president of Sawyers, Inc. when it acquired the buildings and was chairman of the board for two years immediately preceding transfer of the buildings to petitioners.

Although the Commissioner is quite right that an owner-user is motivated by the same profit seeking as controls a lessor (Br. 16), the impact of obsolescence features upon economic useful life may differ between an owner-user on the one hand, and an owner-lessor on the other hand, even when the same buildings are involved. Since the obsolescence features were initially acceptable to Sawyers, Inc. as owner-user, it might have been improper for Sawyers, Inc. to have taken them into account when determining economic useful life. The fact that the obsolescence features could be disregarded by Sawyers, Inc. as owner-user does not alter the situation faced by the petitioners. There are many reasons other than the effect of the obsolescence features why Sawyers, Inc. might decline to renew the lease. By divesting itself of the investment in the Chicago Buildings and leasing them back under a short term lease with renewal options, Sawyers, Inc. acquired the flexibility of being able to move when other buildings better serve future requirements. While the buildings were initially acceptable to Sawyers, Inc., it defies reality to assume that more than 25 years would elapse before Sawyers, Inc. could find buildings better suited to changing business needs. As previously pointed out, the Commissioner has never questioned the reality of the obsolescence or the 25 year economic useful life resulting therefrom if petitioners must seek tenants on the open rental market. Petitioners would have been hiding their heads in the sand if they had assumed Sawyers, Inc. could be retained

as a tenant for more than 25 years under a five year lease with a five year renewal at lessee's option. Ostrich-like behavior is not required in determination of economic useful life.

Commissioner Misinterprets the Context in Which
Petitioners Offered the Appraisal Report Showing
Fair Market Value of the Buildings

As authority supporting the Tax Court's refusal to admit the appraisal report showing the fair market value of the Chicago Buildings, the Commissioner cites Estate of Bryan v. Commissioner, 364 F. 2d 751 (4th Cir. 1966). The taxpayer in Estate of Bryan was not attempting to sustain the economic useful life assigned to the property by him. Through an amended petition in the Tax Court, the taxpayer was attempting to shorten the useful life previously established by him and obtain additional depreciation resulting therefrom. As primary support for the shortened lives, the taxpayer submitted a fair market value appraisal from which 30% was deducted as the "inflationary element" leaving a net figure substantially less than the depreciated basis generated by the original lives.

Under the fact situation of Estate of Bryan, the Court may have been justified in making the statement quoted by the Commissioner (Br. 30). Such is a far different context from that in which petitioners offered the appraisal rejected by the Tax Court. Petitioners are not deducting an inflationary element, and are not invoking fair market value as an affirmative weapon to obtain an additional depreciation deduction.

Petitioners merely assert the fair market value appraisal as a defense to depreciation disallowance initiated by the Commissioner.

Completely ignored by the Commissioner is the passage from Massey Motors v. United States, *supra*, quoted in petitioners' opening brief (p. 32) where the Supreme Court related that a purpose of the depreciation allowance is to protect taxpayers from a loss. By loss, the Supreme Court meant a loss other than one resulting from a downward fluctuation in property values. Upon tendering the appraisal showing the fair market values of the buildings on November 3, 1964, petitioners offered to negate any decrease in fair market value of the buildings from petitioners' date of acquisition on September 1, 1959 through November 3, 1964, attributable to a downward fluctuation in property values.³ When downward fluctuation in property value is negated, establishment of a fair market value below depreciated basis on a particular date shows that the depreciation taken to such date was insufficient to accomplish the avowed objective of protecting the taxpayer against loss. How, then, can the Commissioner be right in his determination that petitioners took excessive depreciation. Whether such establishment of fair market value (coupled with negation of any downward fluctuation in property values)

³As it turned out, negation of a downward fluctuation in property value was accomplished by the testimony of the Commissioner's expert witness concerning the excellence of the location which testimony is summarized on page 27 of the Commissioner's brief.

furnishes the positive defense asserted by petitioners, it nevertheless warrants due consideration, and the Tax Court erred in rejecting introduction of the appraisal.

In an effort to brush aside petitioners' citation of Fribourg Nav. Co. v. Commissioner, 383 U.S. 272 (1966), the Commissioner claims the case relates only to salvage value. (Br. 30) This is not an accurate interpretation. The case involved the whole depreciation package, - economic useful life as well as salvage value. Even if Fribourg Nav. Co. was limited to salvage value, anything pertinent to a determination of salvage value has like pertinency to a determination of economic useful life, particularly where (as here) no salvage value was assigned to the property and economic useful life is the only depreciation component.

The Commissioner Garbles the Best Evidence Rule in
an Effort to Avoid the Impact of Revenue Procedure 62-21

Although the Commissioner recognizes that the answer to Question 49 correctly interprets the phrase "accepted on audit" for purposes of triggering the prohibition of Subsection 3.05, part II of the Revenue Procedure 62-21, 1962-2 Cum. Bull. 433 (Br. 33-34), the Commissioner uses rather loose language in relating what the answer says. According to the Commissioner, the answer interprets the phrase "accepted on audit" as covering all situations in which the audit report shows adjustments to class life or contains comments that it was examined but not adjusted. (Br. 34) Such use of "it" obscures exactly what must be examined. A verbatim reading of the answer to Question

49 discloses that the key term is something quite different from the pronoun "it" having "class life" as the antecedent. The pertinent sentence from the answer to Question 49 reads as follows (with the portion thereof relied upon by petitioners being italicized):

"The class life used by a taxpayer will be considered to have been accepted on audit for purposes of applying the provisions of the Revenue Procedure in all situations in which *the audit report shows adjustments to depreciation or contains comments that the depreciation deduction was examined but not adjusted*, or where other specific evidence indicates that the depreciation deduction was examined."

The depreciation deduction, not the property itself, is the thing concerning which the audit report must contain comment as to examination without adjustment.

Two different agents wrote the words "no change" opposite certain items on audit report schedules entitled "ITEM ADJUSTMENTS" (xerox copies at page 14 of petitioners' opening brief). The "no change" endorsement covered loss figures entered by the agents opposite "Rents and royalties" on the item adjustment schedules which loss figures were taken from depreciation schedules in the Graves' returns. These depreciation schedules show not only the total depreciation deductions, but the derivation thereof, including specification of the 25 year lives for the buildings and five year lives for the electrical, heating and plumbing portions of the buildings (xerox copy on page 12 of petitioners' opening brief). The covering letters under which the audit reports were enclosed

to the Graves expressly state that the reports reflect "examination" of the subject tax returns, and the first page of the reports identify the preparing agent as the "examiner."

It is petitioners' contention that the words "no change" written by an "examiner" on a schedule entitled "ITEM ADJUSTMENTS" contained in an audit report represented to reflect an "examination" of tax returns constitutes a pure and simple comment that the items, including the components thereof clearly set forth in the tax returns, were examined but not adjusted. Since this contention rests entirely upon written documentation (the audit reports and the tax returns) it would have been improper to offer supplementing oral testimony in the absence of ambiguity. Petitioners disclaim any ambiguity. The Commissioner must be under some misapprehension concerning the best evidence rule when he complains about petitioners' failure to supply the best evidence. (Br. 36)

Disregarding the documentary context in which the endorsements "no change" were made, the Commissioner accusingly states that petitioners ". . . simply chose, without supporting evidence or authority, to assume . . . that an examining agent never indicates 'no change' with respect to any item unless he has specifically examined not only it but every underlying or contributing item." What the Commissioner studiously overlooks is that the depreciation deductions were not obscure underlying or contributing items, but were clearly set forth on schedules attached to and made a part of the returns. In fact, the depreciation deductions were the largest single deductions in the Graves' returns.

Effect of Revenue Procedure 62-21 Upon 1960 and 1961

If the "no change" comments on the audit reports for 1960 and 1961 complied with the answer to Question 49, the Commissioner recognizes that he is precluded from making the adjustments for 1962 and 1963, but claims the prohibition does not affect 1960 and 1961 (Br. 36). Basis for this assertion is the provision in Section 1, part II, 1962-2 Cum. Bull. 429 that the procedures will be used in connection with the examination of income tax returns the due date for the filing of which is on or after July 12, 1962, and the due dates for filing 1960 and 1961 returns were prior to July 12, 1962.

Subsection 3.05 expressly states that the audit report accepting the class life may have been made before the effective date of the revenue procedure, and expressly precludes the disturbing of depreciation for any subsequent taxable year. There is no limitation in Subsection 3.05 to only those subsequent years the returns for which are due on or after July 12, 1962.

If an audit precludes the disturbing of depreciation for a subsequent year, it necessarily precludes the disturbing of depreciation for the year of the report. Such an interpretation is consistent with the statement in Section 1, part II that the purpose of the procedure is to determine whether there is a clear and convincing basis for a change. If, by virtue of Subsection 3.05, the Commissioner cannot disturb depreciation for 1962 and 1963, how can there be a clear and convincing basis for a change in 1960 or 1961? The policy of not disturbing

depreciation unless there is a clear and convincing basis for a change did not originate in Revenue Procedure 62-21, but is a continuation of the policy announced in Revenue Ruling 90, 1953-1 Cum. Bull 43.

Application of Revenue Procedure 62-21
To Vernon and Theodora Graves

Without citation of authority, the Commissioner denies the solace of Section 62-21 to Vernon and Theodora Graves because their tax returns were never audited. Subsection 3.05 does not speak in terms of the taxpayer whose return has been audited. Rather, Subsection 3.05 speaks in terms of the acceptance of class life used by the taxpayer. This acceptance can just as well occur upon the audit of the return of an owner of an undivided interest in the property. Applying the objective of Revenue Procedure 62-21, if there is no clear and convincing basis for changing the depreciation used by an owner of an undivided major interest, how can there be a clear and convincing basis for a change in the depreciation used by the owner of an undivided minor interest?

Commissioner Ignores His Own Declaration of Policy
Concerning Adjustments in Depreciation Deductions

Nowhere in his brief does the Commissioner mention his announced policy that agents shall propose adjustments in depreciation deductions only where there is a "clear and convincing basis for a change." This policy was first announced in Revenue Ruling 90, 1953-1 Cum. Bull. 43, and restated in Section 1, part II, Revenue Procedures 62-21, 1962-2 Cum. Bull. 418, 429.

Not only does the Commissioner disregard his announced policy, but he goes to the other extreme and claims the decision of the Tax Court supporting his depreciation disallowance should be affirmed unless clearly erroneous. In support of this proposition, the Commissioner cites three Circuit Court cases and two District Court cases. One of the Circuit Court cases cited by the Commissioner in support of his assertion, Southeastern Bldg. Corp. v. Commissioner, 148 F. 2d 879 (5th Cir. 1945), was decided in 1945, prior to the Commissioner's declaration of policy. Furthermore, the taxpayer in that case was claiming an added obsolescence deduction for a particular year in addition to the regular depreciation deductions allowed on the basis of the economic useful life assigned the building by the taxpayer. Such a situation does not fall within the Commissioner's declaration of policy even if it were in effect at that time. In contrast, the petitioners do not seek an added obsolescence deduction. They cite obsolescence factors to defend their selection of the 25 year useful life.

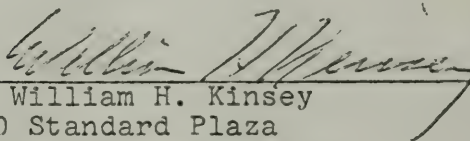
Similarly, the situation involved in Estate of Bryan v. Commissioner, 364 F. 2d 751 (4th Cir. 1966) does not fall within the Commissioner's policy declaration because the taxpayer was seeking added depreciation through a shortening of economic useful lives previously established by him. The only other Circuit Court case cited by the Commissioner, Dinkins v. Commissioner, 378 F. 2d 825, 830 (8th Cir. 1967) is not responsive to the proposition for which cited. There, the Commissioner was relying upon the taxpayer's own replacement

experience in accordance with the mandate of Massey Motors v. United States, 364 U.S. 92 (1960) and Hertz Corporation v. United States, 346 U.S. 122 (1960).

Neither of the District Court cases cited by the Commissioner (Br. 25) makes reference to the Commissioner's declared policy that depreciation deductions will be disturbed by him only where there is a clear and convincing basis for a change. Perhaps, the policy had not been called to the Court's attention. One of the cases, Warnecke v. United States, 256 F. Supp. 800(S.D. N.Y. 1966) contained a finding that the building represented the highest and best use of the land which contrasts with the contrary testimony of petitioners' expert witness rejected as not material by the Tax Court.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON

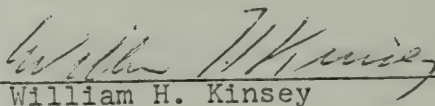


William H. Kinsey
1200 Standard Plaza
Portland, Oregon 97204

Of Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

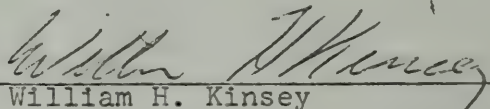


William H. Kinsey

Of Attorneys for Appellants
1200 Standard Plaza
Portland, Oregon 97204

CERTIFICATION OF SERVICE

I, WILLIAM H. KINSEY, attorney for Appellants, hereby certify that I served by mail three true and correct copies of the Appellants' Reply Brief on counsel for the Commissioner of Internal Revenue on the 29th day of January, 1968. I further certify that the copies were placed in a sealed envelope addressed to Mitchell Rogovin, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; said sealed envelope was then deposited in the United States Post Office at Portland, Oregon on the day last mentioned with the postage thereon fully paid.



William H. Kinsey

Of Attorneys for Appellants
1200 Standard Plaza
Portland, Oregon 97204



